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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 2001

In re UNITED STATES *ex rel.*

UNITED STATES COURT OF INTERNATIONAL TRADE,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 1, 2001

98 pp

Questions Presented

1. Whether employees of the federal government can, with impunity, completely disregard or willfully disobey lawful court orders.

2. Whether the United States Court of Appeals for the Federal Circuit had jurisdiction to preclude another court from attempting to ensure that its orders are not completely disregarded or willfully disobeyed.

3. Whether any such jurisdiction on the part of the Court of Appeals for the Federal Circuit extends to suppression even of discovery of the facts and circumstances of disobedience of a lawful court order.

Parties to the Proceedings

The parties that appeared before the Court of International Trade at the hearing on August 10, 2001, from which this petition for a writ of certiorari stems, were the plaintiff Save Domestic Oil, Inc. and the defendant United States in CIT case no. 99-09-00558, as well as intervenor-defendants Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation.

According to the subsequent order of the Court of Appeals for the Federal Circuit in *In re United States of America*, Misc. Docket No. 679 (Sept. 28, 2001) [Appendix A hereto], Saudi Arabian Oil Company, Petróleos Mexicanos, P.M.I. Comercio International S.A. de C.V., and Pemex Exploración y Producción submitted responses to the defendant's petition for a writ of mandamus. Each of those four firms is an intervenor-defendant in the underlying CIT case no. 99-09-00558, but none appeared at the hearing on August 10, 2001, nor did any of the other intervenor-defendants in the underlying case participate in any way, namely:

API Ad Hoc Free Trade Committee

Mobil Corporation

Exxon Corporation

Shell Oil Company

Texaco, Inc.

Chevron Corporation

BP Amoco

N.B. A number of these enterprises have merged since commencement of the underlying case and their individual interventions.

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PETITION FOR WRIT OF CERTIORARI

The lack of jurisdiction on the part of the Court of Appeals for the Federal Circuit and its abuse of process at the extraordinary instigation of certain employees of the U.S. Departments of Commerce and Justice constrain the undersigned, long-standing member of the Supreme Court Bar (and now judge of the United States) to submit this petition *pro se* in the hope of restoration of traditional, proper practice and orderly procedure in the underlying case still pending before the Court of International Trade.

Orders & Opinions Below

The determination of the International Trade Administration, U.S. Department of Commerce ("ITA"), is reported *sub nom. Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela*, 64 Fed.Reg. 44,480 (Aug. 16, 1999).

The opinion and order of the Court of International Trade, remanding after appeal that determination to the ITA, is reported *sub nom. Save Domestic Oil, Inc. v. United States*, 24 CIT ___, 116 F.Supp.2d 1324 (2000), and reprinted in Appendix D hereto. The memorandum and order denying motion(s) of the defendant United States for leave to appeal that interlocutory order of remand is reported at 24 CIT ___, 122 F.Supp.2d 1375 (2000), and reprinted in Appendix C hereto.

The order of the Court of Appeals for the Federal Circuit, dismissing the attempted appeal by the defendant United States (joined in by certain intervenor-defendants) from that interlocutory order of remand, and a second three-judge panel's subsequent order upon petition(s) for a writ of mandamus, vacating orders with regard to possible criminal contempt proceedings in the Court of International Trade, each was stated to have issued pursuant to Federal Circuit Local Rule 47.6 and thus "that the[y] . . . may not be cited as precedent." Nonetheless, since those orders are the roots of this petition, their contents necessarily are printed in Appendixes A and B hereto.

Jurisdiction

The order of the Court of Appeals [Appendix A], vacating the preliminary orders in the Court of International Trade, issued on September 28, 2001. This petition is being filed within 90 days thereof, invoking this Court's jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) and the Court's Rule 13.

Constitutional Provisions & Statutes Involved

Article III, section 1 of the Constitution vests the judicial power of the United States in the Supreme Court, and in such inferior courts as the Congress may from time to time establish, while section 2 thereof extends that power to all cases in law and equity arising under the Constitution and the statutes and treaties of the country.

Congress transformed the United States Customs Court into the Court of International Trade, a national court established under Article III, section 1 of the Constitution by the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. That statute and the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, extended the court's jurisdiction to appeals from ITA determinations described by Congress in that 1979 legislation. For example, the administrative determination underlying this matter issued pursuant to 19 U.S.C. §§ 1671a(c) and 1673a(c) (1999), whereupon the petitioner before the ITA, Save Domestic Oil, Inc., appealed from that negative determination to the Court of International Trade pursuant to 19 U.S.C. § 1516a(a)(1)(A) (1999) and 28 U.S.C. §§ 1581(c), 2631(c), 2632(c).

Congress enacted the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, establishing the United States Court of Appeals for the Federal Circuit ("CAFC"), a national court under Article III, section

1 of the Constitution, and providing for exclusive jurisdiction "of an appeal [only] from a final decision of the United States Court of International Trade". 28 U.S.C. § 1295(a)(5).

Otherwise, Congress has established separate and distinct judicial conferences and councils for the Court of International Trade and the CAFC. *Compare* 28 U.S.C. § 333 *with id.*, § 335, *and id.*, § 372(c)(18).

Congress has provided that the Court of International Trade

> shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority . . . as—
>
> . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401.

STATEMENT OF THE CASE

As this matter now stands, counsel for the ITA have combined with a second panel of the CAFC to subvert the orderly process of judicial review of agency action ordained by Congress. They stand in apparent contempt of that process and the authority of the Court of International Trade ("CIT") to ensure that all litigants before it adhere to the established rules of proper practice and orderly procedure. That is, certain government employees apparently completely disregarded and/or willfully disobeyed the CIT's interlocutory order of remand for some 259 days, whereupon they were ordered to explain in open court why they should not be tried for violation of 18 U.S.C. § 401, *supra*. To date, the defendant's counsel have refused to offer an explanation and have obstructed discovery with respect thereto. The facts and

circumstances of their apparent, continuing contempt can be listed briefly as follows:

1. Oral argument on the plaintiff Save Domestic Oil, Inc.'s motion for judgment on the record compiled with regard to the ITA's *Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela*, 64 Fed.Reg. 44,480 (Aug. 16, 1999), was heard in the CIT on August 14, 2000.

2. On September 19, 2000, the plaintiff's motion was granted to the extent of remand to the Department of

> Commerce for contemplation of commencement of a preliminary investigation [of plaintiff's agency petitions] by its ITA (and referral for such an investigation by the [International Trade Commission] ITC) in accordance with law . . . .

24 CIT at ___, 116 F.Supp.2d at 1343; Appendix D, p. 60a.

3. The CIT interlocutory order of remand of September 19, 2000 afforded the ITA 60 days for the foregoing purpose or for the filing of written reasons for deciding not to initiate such preliminary investigation(s). *See* 24 CIT at ___, 116 F.Supp.2d at 1343; Appendix D, p. 60a.

4. The ITA did not comply with the September 19, 2000 interlocutory order of remand within the allotted initial timeframe.

5. The ITA made no timely motion for an extension of that initial timeframe. *Cf.* 24 CIT at ___, 122 F.Supp.2d at 1379, Part IIA; Appendix C, pp. 15a-16a.

6. The defendant's counsel made no application for certification by the CIT to the CAFC that "a controlling question of law is involved with respect to which there

is a substantial ground for difference of opinion and that an immediate appeal . . . m[ight] materially advance the ultimate termination of the litigation" within the meaning of 28 U.S.C. § 1292(d)(1). *See* 24 CIT at ___, 122 F.Supp.2d at 1378-79, Part II; Appendix C, p. 14a.

7. On Friday, November 17, 2000, the eve of the deadline initially established by the September 19, 2000 interlocutory order of remand, the defendant's counsel filed with the CIT a notice of appeal to the CAFC.

8. Accompanying that notice of appeal were motions styled as one "to stay the Court's order of September 19, 2000 pending appeal" and also "for extension of time in which the Department of Commerce may respond to the court's order of September 19, 2000". 24 CIT at ___, 122 F.Supp.2d at 1377; Appendix C, p. 11a.

9. Those motions by the defendant's counsel were denied by the CIT on November 27, 2000, which, among other things, was

> unable to conclude that the defendant [wa]s attempting to proceed in good faith as opposed to in further delay of final determination of plaintiff's prayer for relief if not in contempt.

24 CIT at ___, 122 F.Supp.2d at 1381; Appendix C, p. 18a.

10. Relief similar to that sought by the defendant's last-minute motions in the CIT was pursued in the CAFC, which did not grant it.

11. The attempted appeal from the CIT's interlocutory order of remand of September 19, 2000 was dismissed by the CAFC in an order dated July 31, 2001, which correctly recognized that the CIT

> remanded to Commerce for *contemplation* of commencement of a preliminary investigation. This

> remand order clearly does not conclusively determine a disputed question as required by *Cohen*.

Appendix B, p. 8a (emphasis in original), referring to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

12. The ITA remained in apparent complete disregard, if not contempt, of that interlocutory order of remand of September 19, 2000.

13. On August 6, 2001, the CIT directed the defendant's counsel to appear and

> show cause, if there be any, why [they] should not be formally cited and sanctioned for contempt of court, commencing on or about November 20, 2000.

14. On August 8, 2001, a document entitled Administrative Determination Pursuant to Court Instructions was filed by the ITA with the CIT.

15. On August 9, 2001, the defendant's counsel filed with the CIT a Motion for Reconsideration of the Court's Order to Show Cause, arguing in sum and substance that

> A. No Civil Contempt Sanction Should Be Issued Because Commerce Has Complied With The Court's Remand Order

[and]

> B. No Criminal Contempt Sanction Should Be Issued Because The Prerequisites For Such A Sanction Do Not Exist[.]

Capitalization in original.

16. On August 10, 2001, the CIT held a hearing on the motion for reconsideration, which was denied in part, and also on the court's own motion, which was stated orally (and issued in writing) at the hearing to be that

> all those . . . officers and employees of the Defendant, United States Government, who within the meaning of Sections 401 and 402 of Title 18 of the United States Code, have not obeyed and/or who have willfully resisted lawful compliance with the Court's order of remand of September 19, 2000, to the International Trade Administration, U.S. Department of Commerce, draw near and be heard as to why they, and each of them, should not be punished to the extent permitted by law.

Transcript of the hearing, p. 3.

17. The defendant's counsel were duly informed at the outset that the hearing on August 10, 2001 was being conducted pursuant to Federal Rule of Criminal Procedure 42(b). *See id.* at 4.

18. The defendant's counsel were duly informed at the outset of the hearing on August 10, 2001 that they "will have a fair and complete opportunity . . . to respond." *Id. Cf. id., passim.*

19. The defendant's counsel were duly informed at the outset of the hearing on August 10, 2001 that

> the offense of contempt is very fact specific. And the Court . . . want[s] you to be aware of that as we proceed today . . . in attempting to determine the very specific facts that apparently applied to the—and led to the disregard of this Court's order for some 259 days.

Id. at 7-8.

20. The CIT sought at the hearing on August 10, 2001 to determine the facts of that apparent complete disregard, if not contempt, of its interlocutory order of remand of September 19, 2000. *See id., passim.*

21. The defendant's counsel in attendance at the hearing on August 10, 2001 proved either unwilling or unable to answer certain preliminary, simple questions posed by the CIT, whereupon it was constrained to order them detained and adjourn the hearing.

22. Upon resumption of the hearing in the CIT on August 10, 2001, the Acting United States Attorney for the Southern District of New York was admitted *pro hac vice* on behalf of the defendant, and he promptly offered to respond to certain unanswered questions posed by the CIT, whereupon the defendant's counsel were ordered released and the hearing concluded.

23. On August 17, 2001, the defendant's counsel filed in the CIT a Response to the Inquiries Made by the Court at the Show Cause Hearing of August 10, 2001 and also a memorandum in opposition to the CIT's own motion made at the hearing on August 10, 2001.

24. On August 17, 2001, the defendant's counsel also filed with the CAFC a petition for a writ of mandamus against the undersigned.

25. Whether anyone should be charged with violation of 18 U.S.C. § 401(3), *supra*, has to await the discovery and evaluation of all the evidence and a determination of whether or not to bring the matter to trial before an impartial judge.

26. Since it was not clear from the record developed that all the facts underlying the ITA's apparent complete disregard, if not contempt, of the interlocutory order of remand of September 19, 2000 had been adduced, the CIT appointed as its special prosecutor a lawyer of the highest integrity and standing at the Bar, who is a member of the CAFC Advisory Council and Director of the Federal Circuit Bar Association and who has been Chairman of the CIT Advisory Committee on the Rules of

Practice and President of the Customs and International Trade Bar Association, among other important offices he has served with dedication and distinction.

27. The CIT's order of that appointment on August 21, 2001 directed

> that the special prosecutor file a written report . . . with the court as soon as is practicable, together with any recommendation as to who, if anyone, should stand trial for criminal contempt of the court in CIT case no. 99-09-00558.

28. On August 22, 2001, the defendant's counsel filed with the CAFC a supplemental petition for a writ of mandamus and an emergency motion for a stay, which was granted *sua sponte*.

29. On September 28, 2001, a second panel of CAFC judges, who were not involved in that court's decision of July 31, 2001 [Appendix B] to dismiss for lack of jurisdiction the defendant's appeal from the CIT's interlocutory order of remand of September 19, 2000, issued the *per curiam*, unpublished order [Appendix A], which is the primary focus of this petition for relief.

ARGUMENT

The subversion of traditional, proper practice and orderly procedure by certain employees of the U.S. Departments of Commerce and Justice, which has been compounded now by the decision of the second CAFC panel, is glaring enough to obviate extensive discussion herein.

I

Government Employees Do Not Have License to Completely Disregard or Willfully Disobey Court Orders

Those particular individuals apparently completely disregarded and/or willfully disobeyed a lawful interlocutory order of remand of the CIT for some 259 days. They prayed for, but were denied, a stay of that order in both the CIT and the CAFC.

Absent grant of a stay, the teaching of this Court is and has been as stated in *Maness v. Meyers, Judge*, 419 U.S. 449, 458-60 (1975), for example:

> . . . [T]he basic proposition [is] that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, *absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.* *Howat v. Kansas*, 258 U.S. 181, 189-190 (1922); *Worden v. Searls*, 121 U.S. 14 (1887). The orderly and expeditious administration of justice by the courts requires that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. Mine Workers*, 330 U.S. 258, 293 (1947). This principle is especially applicable to orders issued during trial. *E.g., Illinois v. Allen*, 397 U.S. 337 (1970). Such orders must be complied with promptly and completely, for the alternative would be to frustrate and disrupt the progress of the trial with issues

> collateral to the central questions in litigation. This does not mean, of course, that every ruling by a presiding judge must be accepted in silence. Counsel may object to a ruling. An objection alerts opposing counsel and the court to an issue so that the former may respond and the latter may be fully advised before ruling. *United States v. LaFranca*, 282 U.S. 568, 570 (1931). But, once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders. While claims of error may be preserved in whatever way the applicable rules provide, counsel should neither engage the court in extended discussion once a ruling is made, nor advise a client not to comply. *A lawyer who counsels his client not to comply with a court order during trial would, first, subject his client to contempt, and in addition, if he persisted the lawyer would be exposed to sanctions for obstructing the trial.* Remedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable, and *orderly processes are imperative to the operation of the adversary system of justice.*

Footnote omitted; emphasis added. Indeed, in establishing the CAFC, Congress specifically provided that

> [n]either the application for nor the granting of an [interlocutory] appeal . . . shall stay proceedings in the Court of International Trade . . . unless a stay is ordered by a judge of the Court of International Trade or . . . by the United States Court of Appeals for the Federal Circuit or a judge of that court.

Pub. L. No. 97-164, Title I, § 125, 96 Stat. at 36, 28 U.S.C. § 1292(d)(3). And, since the mere making of a motion does not engender an automatic stay, it is imper-

ative that courts decide such applications expeditiously, which is what the CIT did within five business days herein. *See supra* paras. 7, 9; Appendix C. *Cf.* 28 U.S.C. § 1292(d)(1):

> . . . [T]he United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such [CIT interlocutory] order, if application is made to that Court within ten days after the entry of such order.

The defendant disregarded this statutory provision as well. *See supra* para. 6.

To the extent the nature of our national, federal government remains equatable with historical Anglo-European concepts of a *sovereign*, from its beginning the Congress has waived immunity with regard to the collection of customs duties and the review of that important executive-branch function in courts of the United States. *See, e.g.*, Act of July 4, 1789, 1 Stat. 24. Hence, federal collectors of customs and employees have been summoned to court by importers, wherein they have not enjoyed rights or privileges superior to those afforded their adversaries.

Notwithstanding this fundamental fact, which actually predates the American Constitution, certain such employees[1] have taken the position herein that they did not have to abide promptly an interlocutory ruling of the CIT and also that for the court now even to attempt to call upon them to account for their apparent complete disregard and/or willful disobedience is an immediately-appealable affront to their dignity and reputation as employees of the government. If this unusual, even

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[1] None of them seems to have been anywhere near the "sphere of protected action" discussed by this Court in *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982). *See generally Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Clinton v. Jones*, 520 U.S. 681 (1997).

extraordinary, attitude is permitted to prevail in this matter, it will render the process of judicial review enacted by Congress in the Trade Agreements Act of 1979, as amended, and the Customs Courts Act of 1980, *supra*, essentially nugatory herein, if not in future trade cases, particularly those deemed especially problematic from a political or practical point of view.

Simply stated, the CIT cannot, and therefore will not, permit parties in cases before it, whether governmental or non-governmental, to completely disregard or willfully disobey lawful orders and decisions issued in those cases. As Chief Justice John Marshall reminded such litigants before his Court in 1824:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824), quoted with approval in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695-96 (1976). Or, to recite from the opinion of Mr. Justice Holmes a century later,

> [w]hen the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.

United States v. Norwegian Barque "Thekla", 266 U.S. 328, 339-40 (1924).

II

The CAFC Has No Jurisdiction to Preclude Another Court From Attempting to Ensure That its Lawful Orders Are Obeyed

Of course, justice may only be done if a particular court actually has subject-matter jurisdiction. Congress has provided both the CIT and the CAFC with specific, national jurisdiction, which is exclusive, but also strictly limited. And each court (and all other federal courts) are obligated to determine the extent of their jurisdiction, if any, over each and every matter sought to be brought before them for resolution. Recently, Justice Ginsburg delivered the opinion for a unanimous Court in this regard, namely:

> This case concerns the authority of the federal courts to adjudicate controversies. Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them. In *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998), this Court adhered to the rule that *a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits. Steel Co.* rejected a doctrine, once approved by several Courts of Appeals, that allowed federal tribunals to pretermit jurisdictional objections "where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.*, at 93. Recalling "a long and venerable line of our cases," *id.*, at 94, *Steel Co.* reiterated: "*The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible*

> *and without exception,*' " *id.*, at 94-95 (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)); for "[j]urisdiction is power to declare the law," and " '*[w]ithout jurisdiction the court cannot proceed at all in any cause,*' " 523 U.S., at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1869)). . . .

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577 (1999) (emphasis added).

In compliance with this "inflexible" approach, the CIT made an initial, affirmative determination of subject-matter jurisdiction over the case underlying this matter. *See* 24 CIT at ___, 116 F.Supp.2d at 1332; Appendix D, p. 37a. The first CAFC panel thereafter correctly concluded, in conformity with the intent of Congress and decisions of itself and all the other federal circuit courts of appeals, that it had no jurisdiction over the government's attempted, immediate appeal from the CIT's interlocutory order of remand. *See* Appendix B. *See, e.g.*, 24 CIT at ___, 122 F.Supp.2d at 1377-78; Appendix C, pp. 12a-13a, citing *Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1096 (Fed.Cir. 1996); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206 (Fed.Cir. 1995); *Floral Trade Council v. United States*, 74 F.3d 1200, 1201 (Fed.Cir. 1995); *Camargo Correa Metais, S.A. v. United States*, 52 F.3d 1040, 1042 (Fed.Cir. 1995); *Badger-Powhatan, Div. of Figgie Int'l, Inc. v. United States*, 808 F.2d 823, 825 (Fed.Cir. 1986); *Jeannette Sheet Glass Corp. v. United States*, 803 F.2d 1576, 1581 (Fed.Cir. 1986); *Mall Properties, Inc. v. Marsh*, 841 F.2d 440 (1st Cir.), *cert. denied sub nom. New Haven v. Marsh*, 488 U.S. 848 (1988); *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113 (3d Cir. 1999); *Hanauer v. Reich*, 82 F.3d 1304, 1306-07 (4th Cir. 1996); *Memorial Hosp. Sys. v. Heckler*, 769 F.2d 1043 (5th Cir. 1985); *Canada Coal*

Co. v. Stiltner, 866 F.2d 153 (6th Cir. 1989); *Travis v. Sullivan*, 985 F.2d 919, 921 (7th Cir. 1993); *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n. 2 (8th Cir. 1982); *Collord v. United States Dep't of Interior*, 154 F.3d 933, 935 (9th Cir. 1998); *Baca-Prieto v. Guigni*, 95 F.3d 1006, 1008-09 (10th Cir. 1996); *Howell v. Schweiker*, 699 F.2d 524 (11th Cir. 1983); *Bergerco Canada v. United States Treasury Dep't*, 129 F.3d 189, 191-92 (D.C.Cir. 1997).

Notwithstanding this compelling and pervasive precedent in all of the federal judicial circuits, as ordained by Congress, the second CAFC panel pays it no heed whatsoever in reaching to accommodate the petition(s) for mandamus presented by the defendant's counsel, nor does it seemingly either recognize or respect the obvious gravamen of the decision of the first CAFC panel on July 31, 2001, to wit, that their court of appeals is not now properly possessed of any subject-matter jurisdiction.

Perhaps, that second panel's rush to accommodate *ultra vires* the government was the result of skillful counsel's advocacy. At the hearing on August 10, 2001, the CIT had queried those in attendance about attempting to appeal the interlocutory order of remand to the ITA, given the weight of the foregoing judicial precedent, as well as their agencies' own, regular practice with respect to such orders. Their written response on August 17, 2001 listed twelve names of individuals from the Justice Department and eight from the Commerce Department as "officers and employees that participated in the decision to take an appeal." At the same time, counsel's petition on August 17, 2001 to the CAFC for a writ of mandamus cleverly sought to parlay this chosen circumscription as follows (at pages 2 and 7 thereof, respectively):

> . . . The trial court . . . has . . . threatened to hold in ***criminal*** contempt all present and former officials involved in the government's decision to appeal the remand order.
>
> * * *
>
> . . . The trial court has threatened to proceed with a novel criminal contempt proceeding against present and former officials involved in the government's decision to appeal the court's remand order.

Emphasis in original.

To be sure, given their lie in the case in chief, controlled as it is supposed to be by the foregoing, bedrock principles of proper practice and orderly procedure, the CIT could not completely discount the abortive, attempted appeal by the defendant's counsel, but, at this stage of proceedings, the CIT was (and still is) simply seeking answers as to how and why they apparently completely disregarded and/or willfully disobeyed a lawful court order for the better part of a year. Just as surely, on the other hand, the CIT is not seeking, nor could it seek, to impede any lawful appeal, which in this matter could be taken from any "final decision" within the meaning of 28 U.S.C. § 1295(a)(5).

Contrary to the first CAFC panel, the second seemingly assumes, albeit *sub silentio*, authority to interfere immediately with the matter still nascent before the CIT. But the only jurisdictional predicate pressed by the defendant's counsel in their petition(s) for mandamus was the All-Writs Act, 28 U.S.C. § 1651, which, on its face and as interpreted, requires a primary basis of jurisdiction in need of that act's secondary aid. *See generally Will, U.S. District Judge v. United States*, 389 U.S. 90 (1967); *Bankers Life & Cas. Co. v. Holland, Chief Judge*, 346

U.S. 379 (1953). The second CAFC panel distorts the clear record below by erroneously embracing counsel's gambit that the CIT's consideration of possible contempt be equated exclusively with their "filing the notice of appeal"[2] and by then attempting to justify its immediate suppression of even such consideration via reference to its recent interference with incomplete proceedings before the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims *sub nom. Adams v. Principi*, 256 F.3d 1318 (Fed.Cir. 2001); *Southern Cal. Edison Co. v. United States*, 226 F.3d 1349 (Fed. Cir. 2000); *Dambach v. Gober*, 223 F.3d 1376 (Fed.Cir. 2000); and *Travelstead v. Derwinski*, 978 F.2d 1244 (Fed.Cir. 1992). Whether or not those particular interlocutory abrogations of traditional, orderly procedure are just other examples of CAFC disrespect for the two lower courts established by Congress under Article I of the Constitution, at least the intervention went to the merits in each of those cases. In *Dambach v. Gober*, for example, the CAFC conceded that its

> jurisdiction is limited to review of final decisions . . . , which typically do not include remands because they are not final judgments. *See, e.g., Travelstead v. Derwinski*, 978 F.2d 1244, 1247-49 (Fed.Cir. 1992). We do have jurisdiction, however, when there is a statutory interpretation that will affect the remand proceeding and that legal issue might evade our future review. *See id.* at 1248 (holding that when "the court rendered a 'decision' interpreting a statute . . . and compelling action of the Secretary, on remand, . . . [t]his 'decision' was a final disposition of the proceedings," and was appealable).

223 F.3d at 1379.

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[2] Appendix A, p. 3a.

But the first CAFC panel did not so find with regard to the CIT interlocutory order of remand of September 19, 2000 herein. On the contrary, that panel correctly concluded that that "remand order clearly does not conclusively determine a disputed question as required by *Cohen*"[3] and reaffirmed that, as

> a general matter, remand to administrative agencies are interlocutory orders and are not appealable because they do not meet the requirement of finality.

Appendix B, p. 7a, citing *Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed.Cir. 1986). Moreover, as to the precise matter covered by this petition for certiorari, it should be noted that, in providing for appeals by the veterans in *Adams*, *Dambach* and *Travelstead*, *supra*, as well as those certified by their lower court for interlocutory review, Congress enacted the same caveat as that governing CIT orders, 28 U.S.C. § 1292(d)(3), quoted above, to wit:

> . . . Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

38 U.S.C. § 7292(b)(1). Not only was no stay ordered by the CIT upon the application of the defendant's counsel, the first CAFC panel did not grant any such relief, nor did the second CAFC panel act affirmatively upon the alternative plea of the defendant's counsel that it

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[3] Appendix B, p. 8a.

grant a stay of the CIT's remand order *nunc pro tunc* in order to make clear that criminal contempt proceedings are inappropriate.[4]

III

CAFC Appellate Jurisdiction Does Not Extend to Obstruction of Discovery in the Court of International Trade

The 259-day void of the defendant's own creation continues not finally accounted for. The CIT commenced an attempt to do so via its traditional, plenary authority over parties and members of its Bar representing those litigants that appear before it. Whatever jurisdiction the CAFC may have over the final results of such disciplinary process, the second panel's cryptic unpublished order *per curiam* makes no attempt to persuade an unsuspecting reader of its authority to suppress even discovery in the CIT, a national court constituted by Congress under Article III with its own judicial conference and council. Rather, that panel is seemingly content to conclude that that "court's orders to initiate contempt proceedings were . . . an abuse of discretion." Appendix A, p. 4a.

This attempted suppression flies in the face of a number of well-established principles of law. In *Will, U.S. District Judge v. United States*, *supra*, a case contesting the propriety of a writ of mandamus issued by the Court of Appeals for the Seventh Circuit to compel a trial judge to vacate a portion of a pretrial order, Chief Justice Warren, writing for his Court without dissent, ordered that writ vacated for the following reasons, among others:

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[4] Supplemental Petition [of the United States] for a Writ of Mandamus to the United States Court of International Trade, p. 5 (Aug. 22, 2001).

Due regard, not merely for the reviewing functions of this Court, but for the "drastic and extraordinary" nature of the mandamus remedy, *Ex parte Fahey*, 332 U.S. 258, 259 (1947), and for the extremely awkward position in which it places the District Judge, *id.*, at 260, demands that a court issuing the writ give a reasoned exposition of the basis for its action.

Mandamus is not a punitive remedy. The entire thrust of the Government's justification for mandamus in this case, moreover, is that the writ serves a vital corrective and didactic function. While these aims lay at the core of this Court's decisions in *La Buy [v. Howes Leather Co.*, 352 U.S. 249 (1957)] and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), we fail to see how they can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which the Government rests its attempt to justify the action below.

The peremptory common-law writs are among the most potent weapons in the judicial arsenal. "As extraordinary remedies, they are reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

There is nothing in the record here to demonstrate that this case falls into that category, and thus the judgment below cannot stand. What might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals, we cannot and do not say. Hence the writ is vacated . . . .

389 U.S. at 106-07.

The second CAFC panel's unpublished order does not "give a reasoned exposition of the basis for its action." *Id.* at 107. It is devoid of findings of fact or other discussion and explanation of the evidence on the record in support of its "drastic and extraordinary" conclusion. It is thus "tantamount to an abdication of the very expository and supervisory functions of an appellate court". *Id.*

In *Mallard v. United States District Court*, 490 U.S. 296 (1989), the Court sought to summarize the standards for mandamus as follows:

> . . . "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). See also *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978); *Kerr v. United States District Court for Northern District of California*, 426 U.S. 394, 402 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967). . . . Although "we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,' " *Kerr*, *supra*, at 402, see *Will v. United States*, *supra*, at 95, we have required that petitioners demonstrate a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953), or conduct amounting to "usurpation of [the judicial] power," *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945), to be entitled to issuance of the writ. To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they

> seek, see, *e.g.*, *Kerr*, *supra*, at 403; *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (*per curiam*), and carry "the burden of showing that [their] right to issuance of the writ is 'clear and indisputable,' " *Bankers Life*, *supra*, at 384, quoting *United States v. Duell*, 172 U.S. 576, 582 (1899).

490 U.S. at 308-09 (1989). Nothing on the record herein reflects "clear and indisputable" satisfaction of the burden of the defendant's counsel for grant of their writ. The record reflects neither a "clear abuse of discretion" nor conduct amounting to "usurpation of judicial power"[5] by the CIT. For example, the supplemental petition of the defendant's counsel averred "supervisory mandamus", but it is debatable that such supervision actually exists in this matter, given the independent, national standing of the CIT *vis-à-vis* the CAFC created by Congress. Assuming arguendo, however, that it does exist, the Court in *Will* "reaffirmed" that that kind of supervision applies to a "showing of a persistent disregard of the federal rules." 389 U.S. at 104 n. 14, referring to the holdings in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), and *La Buy, United States District Judge v. Howes Leather Co.*, 352 U.S. 249 (1957). *Accord*: *United States v. James L. Watson, Judge, United States Customs Court*, 66 CCPA 107, 111 n. 7, C.A.D. 1230, 603 F.2d 192, 195 n. 7 (1979). Here, the only disregard of the federal rules clearly evident has been on the part of the government, if not also the CAFC. Does the asking of simple questions of the parties in open court[6] constitute "a clear abuse of discretion"? Suffice it to respond with the refrain from *Allied Chemical Corp. v.*

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5 *In re Calmar, Inc.*, 854 F.2d 461, 464 (Fed.Cir. 1988).

6 At the hearing on August 10, 2001, the CIT carefully avoided anything even arguably within the realm of executive privilege or self-incrimination.

Daiflon, Inc., 449 U.S. 33, 36 (1980), reversing yet another erroneous grant of a writ of mandamus:

"What never? Well, *hardly* ever!"

Italics in original.

Certainly, this case can hardly be considered as an exception to the Court's emphatic intimation of "never".

Conclusion

In the experience of the undersigned, this regrettable instance of certain employees of the government apparently assuming that they need not comport with traditional, proper practice and orderly procedure, which disregard or genuine contempt[7] has now led to their inducement of a second panel of the Court of Appeals for the Federal Circuit to ignore the decision of that court's prior panel on July 31, 2001, as well as to disregard the facts, the law, and the role and requirements of their institution of but "limited jurisdiction"[8] enacted by Congress. Only vacation of that second panel's *per curiam*, unpublished order of September 28, 2001 can return the underlying case in the Court of International Trade to the process of pursuing orderly (and then even appealable) finality.

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[7] On October 17 and again on October 19, 2001, the CIT Clerk received new notices of appeal to the CAFC from the two recalcitrant lawyers at the CIT preliminary hearing on August 10, 2001. Those filings (by mail) appear to be yet another example of practice on the fringe, given the 60-day period of limitation for appeal established by Congress in 28 U.S.C. § 2107(b).

[8] 28 U.S.C. § 1291.

Dated: New York, New York
November 1, 2001

Respectfully submitted,

THOMAS J. AQUILINO, JR.
One Federal Plaza
New York, New York 10278-0001
(212) 264-2854

APPENDIXES

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MISCELLANEOUS DOCKET NO. 679

IN RE UNITED STATES OF AMERICA,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS

Before

LOURIE, CLEVENGER, and LINN,

Circuit Judges.

PER CURIAM.

ORDER

The United States of America petitions for a writ of mandamus to direct the United States Court of International Trade to vacate any orders initiating criminal contempt proceedings and prohibit any future contempt proceedings. The Court of International Trade, Save Domestic Oil, Inc., Saudi Arabian Oil Company, Petroleos Mexicanos, P.M.I. Comercio Internacional SA. de C.V., and PEMEX Exploracion y Produccion submit responses to the mandamus petition. The United States moves for leave to file a reply, with reply attached.

A brief background of this case follows. The Court of International Trade issued an order remanding this case to the Department of Commerce for "contemplation of commencement of a preliminary investigation" in the matter of certain crude petroleum oil products from Iraq, Mexico, Saudi Arabia, and Venezuela. The United States filed a notice of appeal to obtain review of the remand order in this court. The United States also moved to stay the order of the Court of International Trade that required proceedings on remand. On July 31, 2001, this court dismissed the appeal, stating that although "certain remand orders have been determined to meet the finality requirement," the government had not shown that its appeal fell within the holdings of relevant case law or that its appeal came within the appealability exception recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Upon dismissing the appeal, this court stated that the government's motion for stay was moot.

After this court dismissed the government's appeal, the Court of International Trade *sua sponte* commenced proceedings to determine whether the United States or

government officials who participated in the determination to file an appeal should be "punished to the extent permitted by law" for filing the notice of appeal and failing to comply with the remand order while the appeal was pending in this court. The government then filed its mandamus petition in this court. After careful consideration, we will grant the petition.

The remedy of mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power. *In re Calmar, Inc.*, 854 F.2d 461, 464 (Fed. Cir. 1988). Thus, we review the Court of International Trade's determination to initiate criminal contempt proceedings on the basis of an abuse of discretion standard.

We agree with the United States that its determination to file an appeal of the Court of International Trade's remand order was not under the circumstances sufficient to serve as a basis for contempt proceedings. Precedent regarding the appealability of remand orders such as that in the present case is not crystal clear, and the government's arguments offered in support of appealability were not frivolous. Contempt proceedings should not be initiated unless in response to action that is clearly unjustified. Filing a notice of appeal and seeking a stay in this case were not clearly unjustified.

Case law of this circuit holds that some remand orders may be considered final for purposes of appellate jurisdiction. *See, e.g., Adams v. Principi*, 256 F.3d 1318, 1321 (Fed. Cir. 2001) (appellate jurisdiction existed to review remand order when appellant asserted, under the "unusual circumstances" of that case, that he was entitled to a "decision without a remand"); *Southern Cal. Edison Co. v. United States,* 226 F.3d 1349, 1355 (Fed. Cir. 2000) (appellate jurisdiction existed to review remand order of the Court of Federal Claims that required the agency "to implement the court's regulatory

interpretation, which is contrary to the agency's prior interpretation"); *Dambach v. Gober*, 223 F.3d 1376, 1379 (Fed. Cir. 2000) (appellate jurisdiction existed to review remand order that contained "a statutory interpretation that will affect the remand proceeding and that legal issue might evade our future review"); and *Travelstead v. Derwinski*, 978 F.2d 1244, 1248 (Fed. Cir. 1992) (appellate jurisdiction existed to review remand order that "unquestionably terminated the action before the court"). Thus, the determination to seek review of the remand order in this case, and the government's request for a stay of that remand order, cannot serve as a basis for criminal contempt proceedings. The trial court's orders to initiate contempt proceedings were therefore an abuse of discretion.

Accordingly,

IT IS ORDERED THAT:

(1) The mandamus petition is granted to the extent that the Court of International Trade is directed to vacate its orders initiating criminal contempt proceedings.

(2) The motion for leave to file a reply is granted.

FOR THE COURT

Sep 28 2001
Date

JAN HORBALY EWH
Jan Horbaly
Clerk

cc: David M. Cohen, Esq.
Charles O. Verrill, Jr., Esq.
Carolyn B. Lamm, Esq.
Gary N. Horlick, Esq.
U.S. Court of International Trade, Judge
U.S. Court of International Trade, Clerk

APPENDIX B

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-1091

SAVE DOMESTIC OIL, INC.,

Plaintiff-Appellee,

—v.—

UNITED STATES,

Defendant-Appellant,

—and—

API AD HOC FREE TRADE COMMITTEE, SAUDI ARABIAN OIL COMPANY, PETROLEOS DE VENEZUELA, S.A., CITGO PETROLEUM CORPORATION, PETROLEOS MEXICANOS, P.M.I. COMERCIO INTERNACIONAL S.A. DE C.V., PEMEX EXPLORACION Y PRODUCCION, CHEVRON CORPORATION, EXXON CORPORATION, MOBIL CORPORATION, SHELL OIL COMPANY, TEXACO INC., and BP AMOCO,

Defendants.

ON MOTION

Before

RADER, *Circuit Judge*,
FRIEDMAN, *Senior Circuit Judge*,
and GAJARSA, *Circuit Judge*.

GAJARSA, *Circuit Judge*.

ORDER

The United States appeals and moves for a stay, pending appeal, of the Court of International Trade's order remanding the matter to the Department of Commerce for contemplation of commencement of a preliminary investigation in the matter of certain crude petroleum oil products from Iraq, Mexico. Saudi Arabia, and Venezuela. Petroleos Mexicanos, PMI Comercio Internacional, S.A. de C.V., PEMEX Exploracion y Produccion, and Petroleos de Venezuela, S.A. join in and support the United States' motion. Texaco, Inc. joins in and supports the United States' motion. API Ad Hoc Free Trade Committee joins in and supports the United States' motion. Saudi Arabian Oil Company joins in and supports the United States' motion. Save Domestic Oil, Inc. (SDO) opposes and, within its opposition, moves to dismiss the United States' appeal.[1]

---

[1] Because we determine that the United States' appeal from the remand order must be dismissed for lack of jurisdiction, any appeals of the other defendants appeals must also be dismissed.

As a threshold matter, we must determine whether the Court of International Trade's remand order is a final decision for purposes of allowing the United States to appeal. If not, the United States' appeal must be dismissed and its motion for a stay deemed moot. The United States and the defendants argue that the United States may appeal pursuant to certain precedent. Save Domestic Oil disagrees, relying on other precedent.

As a general matter, remands to administrative agencies are interlocutory orders and are not appealable because they do not meet the requirement of finality. *Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986). However, certain remand orders have been determined to meet the finality requirement. In *Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) the Supreme Court concluded that certain district court remands to the Social Security Administration were final for purposes of appeal. In *Forney v. Apfel*, 524 U.S. 266 (1998), the Supreme Court clarified that the language of a provision of the Social Security Act was the basis of its decision in *Finkelstein*. Thus, we review the appealability of the trial court's remand order under the doctrine set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Sears Roebuck & Co. v. United States*, 22 F.3d 1082, 1084 (Fed. Cir. 1994) (analyzing under the *Cohen* doctrine whether the Court of International Trade's interlocutory remand order directing Customs to redetermine its classification of camcorders was appealable). To come within the small class of decisions excepted from the final-judgment rule by *Cohen*, the order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The first requirement is not met by the remand order. In this case, the trial court remanded to Commerce for *contemplation* of commencement of a preliminary investigation. This remand order clearly does not conclusively determine a disputed question as required by *Cohen*.

Accordingly,

IT IS ORDERED THAT:

(1) Save Domestic Oil's motion to dismiss the United States' appeal is granted.

(2) The United States' motion for a stay is moot.

(3) All sides shall bear their own costs.

FOR THE COURT

Jul 31 2001
Date

ARTHUR J. GAJARSA
Arthur J. Gajarsa
Circuit Judge

cc: Charles Owen Verrill, Jr., Esq.
Brian F. Walsh, Esq.
Joseph W. Dorn, Esq.
Kermit W. Almstedt, Esq.
Carolyn B. Lamm, Esq.
Thomas B. Wilner, Esq.
Harry L. Clark, Esq.
Lucius B. Lau, Esq.

Issued as a Mandate: September 21, 2001

Attest: 9/21/01 A True Copy

[ILLEGIBLE]
Deputy Clerk

APPENDIX C

Slip Op. 00-158

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 99-09-00558
Dated: November 27, 2000

SAVE DOMESTIC OIL, INC.,

Plaintiff,

—v.—

UNITED STATES,

Defendant.

Memorandum & Order

[Defendant's motion(s) for leave to appeal from interlocutory order of remand to the International Trade Administration denied.]

Wiley, Rein & Fielding (*Charles Owen Verrill, Jr.* and *Timothy C. Brightbill*) for the plaintiff.

David W. Ogden, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*A. David Lafer* and *Lucius B. Lau*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Robert J. Heilferty*), of counsel, for the defendant.

White & Case (*Carolyn B. Lamm* and *Adams C. Lee*) for intervenor-defendant Saudi Arabian Oil Company.

Shearman & Sterling (*Thomas B. Wilner* and *Jeffrey M. Winton*) for intervenor-defendants Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation.

O'Melveny & Myers LLP (*Gary Horlick*) for intervenor-defendants Petróleos Mexicanos, P.M.I. Comercio Internacional S.A. de C.V., and PEMEX Exploración y Producción.

AQUILINO, Judge: The plaintiff commenced this case for judicial review of *Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela*, 64 Fed.Reg. 44,480 (Aug. 16, 1999), and thereafter interposed a motion for judgment on the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") in regard thereto. A hearing was held in open court in August 2000, whereafter plaintiff's motion was granted in slip op. 00-120[1] to the extent of

> remand[ ] to Commerce for contemplation of commencement of a preliminary investigation by its ITA (and referral for such an investigation by the ITC) in accordance with law . . . . The defendant may have 60 days . . . for this purpose. . . .
>
> If the result of this remand is not initiation of preliminary investigation(s) by the ITA (and the ITC), the written reasons therefor are to be filed with the

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[1] 24 CIT ___, 116 F.Supp.2d 1324 (2000). Familiarity with this decision is presumed herein.

court on or before the close of the aforesaid 60-day period . . . .[2]

What the defendant filed with the court as that period ended was not any such report, rather a notice of appeal to the U.S. Court of Appeals for the Federal Circuit, accompanied by motions styled as one "to stay the Court's order of September 19, 2000 pending appeal" and also "for extension of time in which the Department of Commerce may respond to the court's order of September 19, 2000". The intervenor-defendants from Saudi Arabia, Venezuela and México have followed defendant's lead with their own notices of appeal and a joint Memorandum in Support of Motion of the United States for Stay Pending Appeal.[3]

I

Section 1295(a)(5) of Title 28, U.S.C. provides that the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of the Court of International Trade. This provision comports, of course, with the bedrock principle of federal jurisprudence that the right to appeal be limited to final decisions which end litigation on the merits. *See, e.g., Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 429-30 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74 (1981); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Catlin v. United States*, 324 U.S. 229, 233

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[2] 24 CIT at ___, 116 F.Supp.2d at ___. ITC is an acronym used in reference to the U.S. International Trade Commission.

[3] Notices of appeal have also been filed at the last minute by intervenor-defendants Texaco, Inc. and API Ad Hoc Free Trade Committee as well as by BP Amoco, which intervenor-defendant apparently now intends to be known as BP America, Inc.

(1945). *But see, e.g., Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), referring to a

> small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Certainly, this court's September 19 opinion and order, on its face, is not such a final decision or within that "small class", nor was it intended to be. And in such a case, remanding an ITA (or ITC) determination under the Trade Agreements Act of 1979, as amended, for reconsideration by the particular agency, the court of appeals has enforced the principle that an order remanding a matter to an administrative agency for further findings and proceedings is not final and immediately appealable. *Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986). *See, e.g., Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1096 (Fed.Cir. 1996); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206 (Fed.Cir. 1995); *Floral Trade Council v. United States*, 74 F.3d 1200, 1201 (Fed.Cir. 1995); *Camargo Correa Metais, S.A. v. United States*, 52 F.3d 1040, 1042 (Fed. Cir. 1995); *Badger-Powhatan, Div. of Figgie Int'l, Inc. v. United States*, 808 F.2d 823, 825 (Fed.Cir. 1986); *Jeannette Sheet Glass Corp. v. United States*, 803 F.2d 1576, 1581 (Fed.Cir. 1986). *See also Mall Properties, Inc. v. Marsh*, 841 F.2d 440 (1st Cir.), *cert. denied sub nom. New Haven v. Marsh*, 448 U.S. 848 (1988); *Perales v. Sullivan*, 948 F.2d 1348, 1353 (2d Cir. 1991); *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113 (3d Cir. 1999); *Hanauer v. Reich*, 82 F.3d 1304, 1306-07 (4th Cir. 1996); *Memorial Hosp. Sys. v. Heckler*, 769 F.2d 1043 (5th Cir. 1985); *Canada Coal Co. v. Stiltner*, 866 F.2d 153 (6th Cir.

1989); *Travis v. Sullivan*, 985 F.2d 919, 921 (7th Cir. 1993); *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n. 2 (8th Cir. 1982); *Collord v. United States Dep't of Interior*, 154 F.3d 933, 935 (9th Cir. 1998); *Baca-Prieto v. Guigni*, 95 F.3d 1006, 1008-09 (10th Cir. 1996); *Howell v. Schweiker*, 699 F.2d 524 (11th Cir. 1983); *Bergerco Canada v. United States Treasury Dep't*, 129 F.3d 189, 191-92 (D.C. Cir. 1997). Indeed, in *Brother Indus. (USA), Inc. v. United States*, 16 CIT 789, 801 F.Supp. 751 (1992), the court reversed and remanded an ITA determination that the named plaintiff did not have standing to file a petition with the agency on behalf of the particular domestic industry, whereupon the defendant government sought to appeal immediately therefrom. The court of appeals dismissed that attempt, *Brother Indus. (USA), Inc. v. United States*, 1 F.3d 1253 (Fed.Cir. 1993). Its order was based, in part, upon reasoning that

> the United States may appear again before the trial court and would also be able to challenge the remand as an appellee in the event that the Court of International Trade affirms the post-remand determination and one of the private parties appeals.

1993 U.S. App. LEXIS 15463, at *12. That is, *final* dispositions by the Court of International Trade of the results of remands to the ITA and the ITC can be, and often are, appealed to the Federal Circuit. *See, e.g., Aimcor v. United States*, 154 F.3d 1375, 1378 (Fed.Cir. 1998); *Sears Roebuck & Co. v. United States*, 22 F.3d 1082, 1085 (Fed.Cir. 1994). *Cf.* Defendant's Memorandum in Support of its Motion to Stay the Court's Order of September 19, 2000 Pending Appeal [hereinafter "Defendant's Stay Memorandum"], p. 14 ("the Government unquestionably has a right to challenge an adverse final decision rendered by this Court").

II

Notwithstanding the continuing, general disfavor of appeals from interlocutory federal-court orders, the so-called Interlocutory Appeals Act, as amended, has provided for a certain few, including to the Federal Circuit, currently in part as follows:

> (1) When . . . any judge of the Court of International Trade, in issuing any . . . interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.
>
> * * *
>
> (3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade . . . unless a stay is ordered by a judge of the Court of International Trade . . . or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

28 U.S.C. § 1292(d). As intended by Congress, these and the other provisions of section 1292 have been strictly enforced. In fact, failure to formally petition for leave thereunder, even by the government, has been held to preclude jurisdiction over such an attempted appeal. *E.g.*, *Stone v. Heckler*, 722 F.2d 464 (9th Cir. 1983). Moreover, according to the statute, to be appealable an interlocutory order by this court should contain a "state-

ment that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation".

No party requested (or has requested) that the court consider inclusion of such a statement in its order at or since the time it was handed down. Perhaps, this has been due to the inability of counsel to discern any more of a lawful basis therefor than this court was or is able to conjure. Be this circumstance as it may, the defendant and the intervenor-defendants which appeared at the August 2000 hearing have now filed notices of appeal.

A

Defendant's Motion for Extension of Time was received on the eve of the expiration of the 60-day remand period established by the September 19th order. The motion purports to be made pursuant to CIT Rule 6(b), which provides in part:

> (2) The motion for extension of time must set forth the . . . reason or reasons upon which the motion is based. The motion shall be filed prior to the expiration of the period allowed for the performance of the act to which the motion relates . . . ; except, when for good cause shown, the delay in filing was the result of excusable neglect or circumstances beyond the control of the party.
>
> (3) No disposition shall be made until the court acts upon the motion for extension of time.

The sole reason given for the motion is

> so that this Court and, if need be, the United States Court of Appeals for the Federal Circuit may con-

> sider the defendant's motion to stay the Court's order of September 19, 2000 pending appeal.

In accordance with the foregoing rule, this court has long warned counsel, including those representing the Department and Secretary of Commerce, that the rule's dictate is

> that motions for extension of time, which require prompt attention, be made far enough in advance of deadlines so as to afford the court at least some time within the litigants' periods to perform to decide them. Otherwise, parties like the defendants herein could automatically extend the time mandates of Congress and this Court of International Trade.

Internor Trade Inc. v. United States, 10 CIT 472, 473 (1986) (footnote omitted). In again not complying correctly with this rule, while attempting at the same time to divest this court of jurisdiction via the filing of a notice of appeal, the defendant hardly leaves the undersigned now in a position to amend a material element of the September 19th order from which appeal has been sought.

B

When final judgments and orders are properly appealed, CIT Rule 62 provides jurisdiction limited to stay of any related enforcement proceedings. Defendant's motion for a stay purports to be made pursuant to Rule 62(d), but that subsection and the other parts of that rule are predicated upon a final judgment or appealable order, granting or denying, for example, a preliminary injunction.

Since this is not the case here, defendant's attempted reliance on the rule cited is inapposite, making its motion in essence one for leave to appeal now to the Federal Circuit, if not simply for greater delay in resolv-

ing plaintiff's petition for relief in accordance with law. Given the strict standards for perfection of such interlocutory appeals, as established by Congress in 28 U.S.C. § 1292 and enforced by the federal courts of appeals nationwide, *supra*, this court is not in a position to grant defendant's motion. *See, e.g., Philipp Bros., Inc. v. United States*, 10 CIT 448, 449, 640 F.Supp. 261, 262 (1986) ("There is no justification for a stay pending appeal if the appeal itself cannot be heard").

(1)

Assuming arguendo that the defendant has commenced a lawful appeal from the September 19th order, its motion for a stay recites the standards that must be satisfied before such related equitable relief can attach, to wit:

> . . . (1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). *See, e.g., Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed.Cir. 1990). But the motion fails to provide facts that might support the requested extraordinary interim relief. It is almost exclusively an adumbration of "substantial legal questions"[4] which the facts and circumstances of this case arguably have given rise to, but which were known to the parties originally at the ITA, before they came to court, and before slip op. 00-120 issued, discussing them in further detail. There

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[4] Defendant's Stay Memorandum, pp. 6, 7, 9, 11, 12, 13, 20.

is no showing that the agency has taken[5], or will take, any steps to lend its expert assistance to the court in reaching the just, speedy, and inexpensive final determination of this case required by CIT Rule 1. Engendering this perception, the defendant, at a minimum, should have announced its current stance sooner. Now, it is clearly not in compliance with either the letter or the spirit of the September 19th order. Hence, there do not appear to be any proceedings, actual or imminent, the stay of which might somehow better preserve the defendant's right to articulate on appeal its view of the underlying law.

With regard to the established procedure for consideration of a motion for a stay pending appeal, *supra*, this and other courts have required that all four elements favor an applicant for such relief to be granted but also that

> [w]hen harm to [the] applicant is great enough, a court will not require "a strong showing" that [the]applicant is "likely to succeed on the merits" . . . *provided* the other factors militate in [it]s favor.

Earth Island Inst. v. Christopher, 20 CIT 1389, 1397, 948 F.Supp. 1062, 1069 (1996), quoting *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d at 513 (emphasis in original), in turn citing *Hilton v. Braunskill*, *supra*.

Here, the government reaffirms that, in a case such as this, the public interest "is best served by ensuring that Commerce complies with the law and interprets and applies laws and regulations correctly." Defendant's Stay Memorandum, p. 19, citing *Neenah Foundry Co. v. United*

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[5] *See, e.g., id.* at 14 ("if Commerce responds to the Court's order by initiating antidumping or countervailing duty investigations") and at 15 ("if Commerce responds . . .") and at 17 ("Commerce may respond to the remand order by commencing anti-dumping and/or countervailing duty investigations (a result specifically contemplated by slip opinion 00-120)").

States, 24 CIT ___, ___, 86 F.Supp.2d 1308, 1317 (2000). *Accord*: Plaintiff's Response Memorandum, p. 4. With regard to the third prong of the controlling test quoted above, the court can also concur with the defendant, at least to the extent that it cannot foresee at the moment how a stay would exacerbate whatever injury the plaintiff consortium of independent domestic crude petroleum oil producers may have been suffering at the time of the filing of its petition for relief with the ITA (and ITC) given the world-crude-oil-market trend since then.

Indeed, this trend, and the underlying global dynamics of that market, make the representation at bar by the intervenor-defendants from México, Venezuela and Saudi Arabia barely believable, to wit:

> If not stayed, according to the leading expert, th[e court's] order will significantly threaten the ability of the subject countries to continue supplying crude oil to the United States which, in turn, will seriously disrupt supply to the U.S. market and "cause havoc in the market place and immediate substantial harm to U.S. interests."

Intervenor-Defendants' Memorandum in Support of Motion of the United States for Stay Pending Appeal, p. 2, referring to and quoting PIRA Energy Group, *The "Dumping" Case and Oil Market Risks*, p. 6 (Nov. 2000). On its part, the government, whatever its current position *vis-à-vis* the Organization of Petroleum Exporting Countries and those other national and multinational crude-oil producers that seemingly follow in the cartel's wake, makes no such reference to the state of the market in its claim of irreparable injury absent an immediate stay. Rather, the defendant simply states:

> . . . Specifically, in the absence of a stay, the Government may lose its statutory right to obtain judicial review of slip opinion 00-120.

Defendant's Stay Memorandum, p. 13. But of course, given the traditional, lawful process for appellate review referred to above, this alleged concern is all but baseless, nor could it or should it be otherwise.

Finally, while the defendant claims to be of the view that this court's remand to the ITA for contemplation of commencement of a *preliminary* investigation, or report thereon in the absence thereof, gives rise to "substantial legal questions", the court is definitely unable to conclude, as *Hilton v. Braunskill*, *supra*, requires, that the defendant "has made a strong showing that [it] is likely to succeed on the merits". On the contrary, as set forth in slip op. 00-120, the intent of Congress in enacting and amending the Trade Agreements Act of 1979, the statute resulting from continuing legislative refinement, and the ITA's consistent preliminary investigative approach in more than one thousand administrative proceedings initiated thereunder are surely much more compelling in this regard.

III

In light of the foregoing, defendant's motions for an extension of time and for a stay pending appeal must be, and each hereby is, denied. Furthermore, given the facts and circumstances of this case, the court is unable to conclude that the defendant is attempting to proceed in good faith as opposed to in further delay of final determination of plaintiff's prayer for relief if not in contempt.

So ordered.

Dated: New York, New York
November 27, 2000

THOMAS J. AQUILINO, JR.
Judge

APPENDIX D

Slip Op. 00-120

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 99-09-00558
Decided: September 19, 2000

SAVE DOMESTIC OIL, INC.,

Plaintiff,

—v.—

UNITED STATES,

Defendant,

—and—

API AD HOC FREE TRADE COMMITTEE *et alia*,

Intervenor-Defendants.

Opinion & Order

[Plaintiff's motion for judgment on the agency record granted; remanded to the International Trade Administration.]

Wiley, Rein & Fielding (*Charles Owen Verrill, Jr.* and *Timothy C. Brightbill*) for the plaintiff.

David W. Ogden, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch,

Civil Division, U.S. Department of Justice (*A. David Lafer* and *Lucius B. Lau*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Robert J. Heilferty*), of counsel, for the defendant.

Dewey Ballantine LLP (*Harry L. Clark*, *Michael H. Stein*, *Bradford L. Ward* and *John W. Bohn*) for intervenor-defendant API Ad Hoc Free Trade Committee.

White & Case (*Carolyn B. Lamm*, *Adams C. Lee* and *David L. Elmont*) for intervenor-defendant Saudi Arabian Oil Company.

Shearman & Sterling (*Thomas B. Wilner*, *Jeffrey M. Winton* and *Jeronimo Gomez del Campo*) for intervenor-defendants Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation.

O'Melveny & Myers LLP (*Gary N. Horlick* and *Michael A. Meyer*) for intervenor-defendants Petróleos Mexicanos, P.M.I. Comercio Internacional S.A. de C.V., and PEMEX Exploración y Producción.

King & Spalding (*Joseph W. Dorn* and *Duane W. Layton*) for intervenor-defendant Texaco Inc.

Barnes, Richardson & Colburn (*Robert E. Burke*, *Brian F. Walsh* and *Robert F. Seely*) for intervenor-defendant BP Amoco.

AQUILINO, Judge: This case arises from the filing a year ago with the International Trade Administration, U.S. Department of Commerce ("ITA") and the U.S. International Trade Commission ("ITC") of a nine-volume Petition for the Imposition of Antidumping and Countervailing Duties on certain crude petroleum

oil products from Iraq, México, Saudi Arabia and Venezuela. The petitioner was stated to be an incorporated consortium of independent domestic crude petroleum oil producers, Save Domestic Oil, Inc. ("SDO"), the individual members of which were named Apache Corporation (Houston, Tex.), Arrow Oil & Gas, Inc. (Norman, Okla.), BOGO Energy Corp. (Oklahoma City, Okla.), Continental Resources, Inc. (Enid, Okla.), Crescent Exploration (Oklahoma City), Farrar Oil Company (Mt. Vernon, Ill.), Houghton Oil & Gas, Inc. (Midland, Tex.), Keener Oil & Gas Company (Tulsa, Okla.), Phoenix Production Co. (Cody, Wyo.), Pickrell Drilling Co., Inc. (Great Bend, Kan.), Royal Drilling & Producing, Inc. (Crossville, Ill.), and Tilley Oil & Gas, Inc. (Enid). The petition requested that the ITA and ITC

> undertake a "regional industry" analysis in determining industry support, market penetration and injury to the domestic crude petroleum oil industry caused by subject imports[,] . . . defin[ing] th[e] regional market to include, generally, the District of Columbia and the 43 contiguous States (and the U.S. Outer Continental Shelf in the Gulf of Mexico), exclusive of Washington, Oregon, California, Arizona, and Nevada.[1]

Some 40 days later, while finding the petitioner to be an "interested party" within the meaning of 19 U.S.C. §1677(9) and that it had made "an adequate regional-industry claim for initiation purposes", the ITA did not accept the petition on the ground that it "did not have the required industry support". *Dismissal of Antidumping*

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[1] ITA Record Document ("R.Doc") 1, vol. I, p. 2. This region was also described in terms of U.S. "Petroleum Administration for Defense Districts" or "PADD"s I to IV. *See id.* at 3. *See also id.* at 4 ("The Region Is A Market Separate From The Rest Of The United States").

and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela, 64 Fed.Reg. 44,480 (Aug. 16, 1999). Whereupon this case commenced, seeking judicial review and reversal of this determination.

I

Public information of the Department of Commerce[2] shows over one thousand one hundred petitions to have been filed with the ITA since enactment of the Trade Agreements Act of 1979, yet apparently only one was subjected to the kind of threshold agency rejection at issue herein. *See Carbon Steel Plate From Belgium and the Federal Republic of Germany; Rescission of Notice Announcing Initiation of Antidumping Investigations and Dismissal of Petition*, 49 Fed.Reg. 3,503 (Jan. 27, 1984) (producers of well over 95 percent of subject merchandise opposed single-producer petition). In fact, only 17 other petitions are reported as having been summarily dismissed by the ITA over the last 20 years. Ten of them were found not to allege a basis upon which antidumping or countervailing duties could be imposed.[3] Another

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[2] U.S. Import Administration, *Antidumping Investigations Case Activity (January 1, 1980 - December 31, 1999)*, at <http://ia.ita.doc.gov/stats/ad8099.htm>; *Countervailing Duty Case Activity (January 1, 1980 - December 31, 1999)*, at <http://ia.ita.doc.gov/stats/cv8099.htm>.

[3] *See Pure and Alloy Magnesium From Norway: Final Negative Determination; Rescission of Investigation and Partial Dismissal of Petition*, 57 Fed.Reg. 30,942 (July 13, 1992); *Pure and Alloy Magnesium From Canada: Final Affirmative Determination; Rescission of Investigation and Partial Dismissal of Petition*, 57 Fed. Reg. 30,939 (July 13, 1992); *Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China ("PRC")*; 57 Fed. Reg. 10,459 (March 26, 1992); *Dismissal of Countervailing Duty Petition and Termination of Proceeding: Pure and Alloy Mag-*

three petitions were dismissed because there had been no or *de minimis* imports of the subject merchandise in the years immediately preceding their respective filings.[4] And four were found not to have been presented by an interested party.[5]

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nesium From Norway, 56 Fed.Reg. 49,748 (Oct. 1, 1991); *Partial Rescission of Initiation of Antidumping Investigations and Dismissal of Petitions; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Romania, Singapore, and Thailand*, 53 Fed.Reg. 39,327 (Oct. 6, 1988); *Potassium Chloride From the Soviet Union; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition*, 49 Fed.Reg. 23,428 (June 6, 1984); *Potassium Chloride From the German Democratic Republic; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition*, 49 Fed.Reg. 23,428 (June 6, 1984); *Fresh Cut Roses From Colombia; Dismissal of Antidumping Petition*, 46 Fed.Reg. 33,575 (June 30, 1981); *Toy Balloons and Playballs From Mexico; Dismissal of Countervailing Duty Petition*, 46 Fed.Reg. 31,698 (June 17, 1981); *Glass-Lined Steel Storage Tanks, Pressure Vessels and Parts Thereof From France; Dismissal of Countervailing Duty Petition*, 45 Fed.Reg. 67,404 (Oct. 10, 1980).

[4] *See Initiation of Antidumping Investigation/Dismissal of Antidumping Petitions Certain Steel Products From Romania*, 47 Fed.Reg. 5,752 (Feb. 8, 1982); *Initiation of Countervailing Duty Investigations/Dismissal of Countervailing Duty Petition Certain Steel Products From Luxembourg*, 47 Fed.Reg. 5,750 (Feb. 8, 1982); *Initiation of Countervailing Duty Investigations/Dismissal of Countervailing Duty Petitions; Certain Steel Products From the Netherlands*, 47 Fed.Reg. 5,743 (Feb. 8, 1982).

[5] *See Rescission of Initiation of Antidumping Duty Investigation and Dismissal of Petition: Certain Portable Electric Typewriters From Singapore*, 56 Fed.Reg. 49,880 (Oct. 2, 1991); *High Information Content Flat Panel Displays and Display Glass Therefor From Japan: Final Determination; Rescission of Investigation and Partial Dismissal of Petition*, 56 Fed.Reg. 32,376 (July 16, 1991); *Hot-Rolled Carbon Steel Sheet From Belgium and the Federal Republic of Germany; Rescission of Notice Announcing Initiation of Antidumping Investigations and Dismissal of Petition*, 48 Fed. Reg. 52,757 (Nov. 22, 1983); *Latchet Hook Kits From the United Kingdom; Dismissal of Antidumping Petition*, 45 Fed.Reg. 81,241 (Dec. 10, 1980).

A

Be then all those other, apparently facially-acceptable petitions as they were, from the beginning the Trade Agreements Act has contemplated ITA dismissal of petitions deemed not in compliance with the threshold standards set by Congress. As amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (Dec. 8, 1994), (and by the Miscellaneous Trade and Technical Corrections Act of 1996, Pub. L. No. 104-295, 110 Stat. 3514 (Oct. 11, 1996)), the statute governing procedures for initiating herein an antidumping-duty investigation provided, in part, as follows:

(b) Initiation by petition

(1) Petition requirements

An antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C),(D),(E),(F), or (G) of section 1677(9) of this title files a petition with the [ITA], on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations. The petition may be amended at such time, and upon such conditions, as the [ITA] and the [ITC] may permit.

* * *

(3) Action with respect to petitions

(A) Notification of governments

Upon receipt of a petition filed under paragraph (1), the [ITA] shall notify the government of any exporting country named in the petition by delivering a public version of the

petition to an appropriate representative of such country.

(B) Acceptance of communications

The [ITA] shall not accept any unsolicited oral or written communication from any person other than an interested party described in section 1677(9)(C),(D),(E),(F), or (G) of this title before the [ITA] makes its decision whether to initiate an investigation, except as provided in subsection (c)(4)(D) of this section, and except for inquiries regarding the status of the [ITA]'s consideration of the petition.

* * *

(c) Petition determination

(1) In general

(A) Time for initial determination

Except as provided in subparagraph (B), within 20 days after the date on which a petition is filed under subsection (b) of this section, the [ITA] shall—

(i) after examining, on the basis of sources readily available to the [ITA], the accuracy and adequacy of the evidence provided in the petition, determine whether the petition alleges the elements necessary for the imposition of a duty under section 1673 of this title and contains information reasonably available to the petitioner supporting the allegations, and

(ii) determine if the petition has been filed by or on behalf of the industry.

(B) Extension of time

In any case in which the [ITA] is required to poll or otherwise determine support for the petition by the industry under paragraph (4)(D), the [ITA] may, in exceptional circumstances, apply subparagraph (A) by substituting "a maximum of 40 days" for "20 days".

* * *

(2) Affirmative determinations

If the determinations under clauses (i) and (ii) of paragraph (1)(A) are affirmative, the [ITA] shall initiate an investigation to determine whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value.

(3) Negative determinations

If the determination under clause (i) or (ii) of paragraph (1)(A) is negative, the [ITA] shall dismiss the petition, terminate the proceeding, and notify the petitioner in writing of the reasons for the determination.

(4) Determination of industry support

(A) General rule

For purposes of this subsection, the [ITA] shall determine that the petition has been filed by or on behalf of the industry, if—

(i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and

(ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

(B) Certain positions disregarded

(i) Producers related to foreign producers

In determining industry support under subparagraph (A), the [ITA] shall disregard the position of domestic producers who oppose the petition[ ] if such producers are related to foreign producers, as defined in section 1677(4)(B)(ii) of this title, unless such domestic producers demonstrate that their interests as domestic producers would be adversely affected by the imposition of an antidumping duty order.

(ii) Producers who are importers

The [ITA] may disregard the position of domestic producers of a domestic like product who are importers of the subject merchandise.

(C) Special rule for regional industries

If the petition alleges the industry is a regional industry, the [ITA] shall determine whether the petition has been filed by or on behalf of the industry by applying subparagraph (A) on the basis of production in the region.

(D) Polling the industry

If the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the [ITA] shall—

(i) poll the industry or rely on other information in order to determine if there is support for the petition as required by subparagraph (A), or

(ii) if there is a large number of producers in the industry, the [ITA] may determine industry support for the petition by using any statistically valid sampling method to poll the industry.

(E) Comments by interested parties

Before the [ITA] makes a determination with respect to initiating an investigation, any person who would qualify as an interested party under section 1677(9) of this title if an investigation were initiated, may submit comments or information on the issue of industry support. After the [ITA] makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered.

(5) Definition of domestic producers or workers

For purposes of this subsection, the term "domestic producers or workers" means those interested parties who are eligible to file a petition under subsection (b)(1) of this section.

19 U.S.C. § 1673a. Similar procedure exists for initiating a countervailing-duty investigation.[6]

As indicated above, the ITA, reacting within the strict timeframe adopted by Congress, found the petitioner SDO to be an interested party within the meaning of the statute, and it upheld "for initiation purposes"[7] the claimed existence of a regional industry. However, the Department of Commerce also reported that, pursuant to the foregoing statutory authority, it invited representatives of the governments of México, Saudi Arabia and Venezuela for consultations with respect to the countervailing-duty petitions[8]; it determined that refined prod-

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[6] *See* 19 U.S.C. § 1671a. Of the elements of section 1673a set forth *in haec verba* in this opinion, a textual difference in section 1671a is its notification-of-governments subsection, to wit:

> Upon receipt of a petition filed under paragraph (1), the [ITA] shall—
>
> > (i) notify the government of any exporting country named in the petition by delivering a public version of the petition to an appropriate representative of such country; and
> >
> > (ii) provide the government of any exporting country named in the petition that is a Subsidies Agreement country an opportunity for consultations with respect to the petition.

19 U.S.C. § 1671a(b)(4)(A).

[7] 64 Fed.Reg. at 44,481, col. 1.

[8] *See id.* at 44,480. If those invitation(s) issued pursuant to 19 U.S.C. § 1671a(b)(4)(A)(ii), *supra*, it should be noted that Saudi Arabia (in contrast to the two other invitees) is not a "Subsidies Agreement country" within the meaning of that section, although it is the putative leader of the world cartel, the Organization of Petroleum Exporting Countries ("OPEC"), the *ráison d'être* of which is to control production and fix prices of crude oil. México, while not a formal member of OPEC, apparently attempts to follow its lead. *See, e.g.*, Ibrahim, *Oil Countries Approve World Cutback of 3%*, N.Y. Times, March 24, 1999, p. C1; Preston, *Mexico Playing Unfamiliar*

ucts are not within the domestic like product for purposes of determining industry support for the petition[9];

Role in World Oil Politics, N.Y. Times, March 24, 1998, p. D2. Venezuela is a member of OPEC, as are Iraq and several other countries considered either unfriendly to or genuine enemies of the United States.

Be the lack of direct diplomatic relations with Iraq (and other hostile, oil-producing lands) as it is, nothing in the language of 19 U.S.C. §§ 1671a(b)(4)(A)(i) and 1673a(b)(3), *supra*, exempts the ITA from at least attempting to notify Baghdad of SDO's petition, via the embassy of Poland, which ostensibly represented U.S. interests there [*see, e.g.*, U.S. Dep't of State, *Iraq - Travel Warning* (Sept. 10, 1999)], or otherwise. *Cf.* 19 C.F.R. § 351.202(i) (1999) (ITA "will invite the government of any exporting country named in the petition for consultations"). Indeed, notwithstanding Resolution 661, which was adopted by the Security Council of the United Nations on August 6, 1990 "to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait" and which, among other things, decreed that member states prevent the import of all commodities and products originating in Iraq, and also Executive Order No. 12,724 of the U.S. President *sub nom. Blocking Iraqi Government Property and Prohibiting Transactions With Iraq*, 55 Fed.Reg. 33,089 (Aug. 13, 1990), a report of the U.S. government itself discloses that 146,722,000 barrels of crude oil were imported from Iraq into this country during the period January - July 1999. *See* U.S. Energy Info. Admin., *Petroleum Supply Monthly*, p. 82 (Sept. 1999). By way of comparison, the Table 40 on that page shows imports from México, Saudi Arabia and Venezuela during that period to have been 272.540, 299.957 and 252.837 million barrels, respectively.

Whether the imports from Iraq were under the guise of the so-called "oil-for-food" program *viz.* Resolution 986 of the U.N. Security Council (April 14, 1995) and subsequent resolutions or not, the court has reviewed SDO's 235-page volume II of its petition, relating to alleged dumping in America of those millions of barrels of Iraqi oil, and also its 100-page volume VI, relating to claimed benefits bestowed upon such shipments by the government of Saddam Hussein. And the court must affirm that those averments, on their face, are not clearly frivolous.

[9] *See* 64 Fed.Reg. at 44,481. The ITA also concluded that it did not need to decide definitively whether "lease condensates" are included within the domestic like product. *See id.*

it exercised its statutory discretion to extend the deadline for determining whether to initiate investigations "[b]ecause there was a question as to whether the petitioner met the statutory requirements concerning industry support"[10]; it sought to survey each of the 410 largest producers in the region, which accounted for over 86 percent of regional production, and a 401-company sample of the remaining producers there[11]; it received letters of opposition from a number of companies which accounted for approximately 50 percent of total regional production[12]; and it considered whether or not to disregard them, focusing on the opposing companies' attempt(s) to demonstrate that their interests as domestic producers would be affected adversely by the imposition of an antidumping or countervailing-duty order[13]. As for that focus, the ITA reports specific resort to the API Ad Hoc Free Trade Committee

> because it is composed of the largest U.S. producers in opposition to the petitions and because its treatment is dispositive of the industry support issue.[14]

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10 64 Fed.Reg. at 44,481, col. 3.

11 *See id.* at 44,481-82.

12 *See id.* at 44,482. Notwithstanding the Department's mandate per 19 C.F.R. §351.303(b) (1999) that "all documents" in a matter such as this be addressed and submitted to the Secretary of Commerce, the court notes in passing that the chairman and chief executive officer of at least one major oil company expressed "strong opposition" directly to the President of the United States, with copies of that written displeasure apparently also transmitted directly to the Vice President and the Secretaries of State, Treasury, and Energy, as well as Commerce, and to an Assistant to the President, a Deputy Secretary of the Treasury, an Acting Under Secretary of State, and an Assistant Secretary of Commerce. *See* R.Doc 196.

13 64 Fed.Reg. at 44,482.

14 *Id.*, col. 2. Those 16 firms, in alphabetical order, were listed as ARCO, BHP Petroleum, BP Amoco, Burlington Resources,

According to the agency's determination, the Committee argued

> that its opposition is not based on foreign interests or imports, but rather . . . on the fact that the Committee members' interests as domestic producers would be adversely affected by the imposition of antidumping or countervailing duties. [It] also argues that the petitioner has not alleged that each U.S. producer about which allegations were made is related to a foreign producer in each of the subject countries. Moreover, the petitioner has provided no basis for assuming that a relationship in one country would cause a producer to oppose a case against another country with potentially competing suppliers.
>
> Even assuming there are relationships, the Committee argues, because the interest of domestic producers opposing the petition would be adversely affected by the imposition of an order, the Department must consider their views. . . . Finally, with respect to imports, the Committee argues that importing is a standard practice in the U.S. oil industry and that the large producers account for

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Chevron Corporation, Conoco Inc., Exxon Corporation, Fina, Inc., Kerr-McGee Corporation, Marathon Oil Corporation, Mobil Corporation, Murphy Oil Corporation, Occidental Petroleum Corporation, Phillips Petroleum Company, Shell Oil Company, and Texaco Inc., which list included their crude-oil production figures (in thousands of barrels) for PADDs I-IV for 1997. *See* R.Doc 205.

Not only has the Ad Hoc Committee, itself, representing these firms, been granted leave to intervene in this case as a party defendant, BP Amoco, Chevron, Exxon, Mobil, Shell and Texaco have all intervened on their own accounts. Moreover, the court notes in passing that since then the Exxon and Mobil corporations have formally merged, as has BP Amoco PLC (itself a recent union of two erstwhile major oil companies) with ARCO, formerly known as Atlantic Richfield Company.

> only a small portion of total imports. Moreover, . . . domestic producers which oppose the petition are not bound to imports from the subject countries. Therefore, the Committee argues, the Department should not disregard its opposition.

64 Fed.Reg. at 44,482, col. 2. The ITA accepted these composite arguments in rendering its decision that the petitioner SDO did not have support from more than 50 percent of the production in the region of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition.[15]

B

Plaintiff's complaint pleads nine causes of action herein, which in essence allege (1) the ITA did not include in its calculation the production of a substantial number of domestic producers which support the petition; (2) the agency attributed significant production by SDO-member Apache Corporation to ARCO rather than in support of the petition; (3) the ITA made no finding and did not recognize the views of the Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, CLC in support of the petition on behalf of production-related workers employed by a number of domestic oil producing firms; (4) the agency failed to neutralize the opposition of companies, the workers of which were in support of the petition; (5) the ITA relied on the general arguments of the API Ad Hoc Free Trade Committee, which was contrary to the statutory requirement that individual domestic producers in opposition to the petition prove that their particular interests would be adversely affected by the imposition

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[15] 64 Fed.Reg. at 44,482. The agency eschewed addressing "a number of complex issues regarding the 25-percent test . . . because the 50-percent test has not been met." *Id.*, col. 3.

of antidumping or countervailing duties; (6) the agency should have disregarded the opposition of those domestic producers which import crude petroleum oil from one or more of the countries singled out in the petition; (7) the ITA did not allow associations to express support for SDO members unless those associations qualified themselves as interested parties; (8) in polling the domestic industry, the agency failed to include the support of the Independent Petroleum Association of America and its membership to the extent those members had not otherwise communicated their views; and (9) U.S. Secretary of Energy Richardson stated publicly that the government opposed the petition and that he would attempt to influence the process established by the Trade Agreements Act, *supra*.

The plaintiff has now interposed a motion for judgment upon the agency record pursuant to CIT Rule 56.2, and which is based upon the foregoing averments, save the claim of undue influence by the Secretary and/or the Department of Energy.[16] At a hearing held in open court on August 14, 2000, which was based upon initial review of the ITA record and written submissions on behalf of the parties in appearance, counsel for the defendant were invited to consider consenting to remand to the agency for reconsideration of the complex, competing positions.

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[16] In filing its motion for judgment in March 2000, the plaintiff claimed that,

> [m]ore than six months ago, [it] properly submitted a FOIA request to the Department of Energy regarding the Secretary's involvement in the Commerce proceeding. This request has not been acted on, in contravention of the FOIA statute.

Plaintiff's Brief, p. 42. Whereupon it filed a motion for supplemental briefing following a hoped-for response to the aforesaid request. That motion has been denied. *See Save Domestic Oil, Inc. v. United States*, 24 CIT ___, Slip Op. 00-46 (April 26, 2000).

The defendant declined, and continues to decline, to do so. *See* Hearing Transcript ("Tr."), p. 23; Defendant's Response to the Court's Inquiry Concerning Remand, p. 2 ("the Government is not willing to consent to a remand").

II

Hence, the court is obligated to decide the controversy engendered by the ITA's determination, which, in accordance with the statute, issued within a brief period of time[17]. Jurisdiction is pursuant to 19 U.S.C. § 1516a(a)(1)(A) and 28 U.S.C. §§ 1581(c), 2631(c), 2632(c). The court's standard of review in a case like this is provided by section 2640(b) of Title 28 to be as specified in subsection (b) of section 1516a of Title 19, to wit:

> **(1) Remedy**
>
> The court shall hold unlawful any determination, finding, or conclusion found—
>
> (A) in an action brought under subparagraph (A) . . . of subsection (a)(1) of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

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[17] Indeed, the record reflects understandable concern about its shortness, given the scope and arguable complexity of this case. *See, e.g.*, R.Doc 39 *passim*; R.Doc 215, pp. 7-8; R.Doc 337, p. 3; Tr., pp. 5-6, 8, 11, 20-21, 41-42, 43. *See also* 64 Fed. Reg. at 44,481; Defendant's Response in Opposition to Plaintiff's Motion for Judgment on the Agency Record ["Defendant's Brief"], pp. 7, 26, 71; Brief of Defendant-Intervenor API Ad Hoc Free Trade Comm., pp. 18, 47, 49 and 50, n. 193; Response Brief of Defendant-Intervenor Saudi Arabian Oil Company, p. 39, n. 39; Brief of Petroleos de Venezuela, S.A. and CITGO Petroleum Corp., pp. 10, 11; Brief of Defendant-Intervenor Petróleos Mexicanos *et al.*, pp. 18, 20, 22-23; Brief of Defendant-Intervenor BP Amoco Corp., pp. 7, 9.

(2) Record for review

(A) In general

For the purposes of this subsection, the record, unless otherwise stipulated by the parties, shall consist of—

> (i) a copy of all information presented to or obtained by the [ITA] . . . during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and
>
> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

(B) Confidential or privileged material

The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order. . . .[18]

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[18] The court is constrained to confirm persistent difficulty in reviewing and thus reporting on the complete contents of the record as compiled by the agency, perhaps due to the scope and the complexity of SDO's eight country-specific petition volumes. The ITA's most-reliable indexing seems to be that for Venezuela, Inv. No. A-307-817, ergo the R.Doc numbers cited in this opinion come from that antidumping investigation file. Moreover, certain information which has now been received pursuant to CIT Rule 71(b)(3) ["At any time, the court may order any part of the record retained by the agency to be filed"] is confidential and therefore not subject to publication herein.

A

The crux of defendant's determination is that domestic U.S. producers which opposed SDO's petition demonstrated that their interests as such would be adversely affected by any imposition of antidumping and/or countervailing duties, whereupon their production of the domestic like product was counted against the petition. But according to the statute, 19 U.S.C. §§ 1671a(c)(4)(B)(i), 1673a(c)(4)(B)(i), *supra*, such adverse counting has been prescribed by Congress only when domestic producers are related to foreign producers, as defined in 19 U.S.C. § 1677(4)(B)(ii), which provides:

> **(4) Industry . . .**
>
> **(B) Related parties**
>
> **(i)** If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry.
>
> **(ii)** For purposes of clause (i), a producer and an exporter or importer shall be considered to be related parties, if—
>
> **(I)** the producer directly or indirectly controls the exporter or importer,
>
> **(II)** the exporter or importer directly or indirectly controls the producer,
>
> **(III)** a third party directly or indirectly controls the producer and the exporter or importer, or

> **(IV)** the producer and the exporter or importer directly or indirectly control a third party and there is reason to believe that the relationship causes the producer to act differently than a nonrelated producer.
>
> For purposes of this subparagraph, a party shall be considered to directly or indirectly control another party if the party is legally or operationally in a position to exercise restraint or direction over the other party.

Obviously, the dispositive concept of this provision is *control*. While alluding to "serious questions about the sufficiency of the petitioner's allegations"[19] in this regard, the ITA nonetheless reached beyond those questions to decide the clearly contingent issue of whether the allegedly-foreign-related petition opponents "would be adversely affected" by any duties imposed herein. That approach did not follow the law on its face, nor was the approach even the more expedient, given the parties' presentations and the relatively few days in which to resolve the tandem elements of sections 1671a(c)(4)(B)(i) and 1673a(c)(4)(B)(i) governing disregard of opposition by domestic producers related to foreign producers.

On its part, SDO did allege that 15 of the 16 members of the API Ad Hoc Committee are related to Petroleos de Venezuela, S.A., that nine of those member companies are also related to the Mexican PEMEX enterprise(s), and that eight Committee companies are related to Saudi Aramco. *See, e.g.*, R.Docs 14, 198, 207-10, 226-30, 243, 244, 287, 288, 290. None of the 16 Committee members, however, was alleged to be related to Iraq's state-owned oil business, but SDO did assert that ten of them do

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[19] 64 Fed.Reg. at 44,482, col. 1.

import Iraqi crude, with nine companies alleged to import from México, ten from Saudi Arabia, and also ten from Venezuela. *See, e.g., id.*

With regard to Venezuela, the record does reflect business relationships between Committee companies and enterprises of that country[20], but it does not substantiate that those referred to by SDO entail the kind of control contemplated by section 1677(4)(B)(ii), *supra*, nor did the ITA even attempt to draw any conclusion to the contrary. The same is true with respect to México[21] and Saudi Arabia[22]. Unlike CITGO, Texaco Inc., for exam-

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[20] In fact, although not disclosed by the CIT Forms 13 regarding corporate affiliations and financial interest filed in conjunction with the motion of Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation for leave to intervene as parties defendant herein, the latter firm is wholly-owned by the former. Neither is an Ad Hoc Committee member, however.

The types of relationships alleged by SDO to exist between Committee companies and Venezuelan enterprises are debt-financing, designated-customer, joint-venture. *See, e.g.*, R.Docs 14, 198, 207, 208, 210, 227-30, 243, 244, 287, 288, 290.

[21] *See, e.g.*, R.Docs 14, 207, 209, 210, 226, 227, 229, 230, 244, 287, 290.

[22] Indeed, volumes IV and VIII of SDO's petition regarding this nation undermine any claim of control of or by Committee companies, and thus of any relationship within the purview of the statute quoted in the text. That is, each volume states at the outset:

> Oil exploration and production in Saudi Arabia began in the 1930s, when the Kingdom granted a concession to the Standard Oil Company of California (now Chevron). By the late 1940s, a joint venture of U.S. firms, including Exxon, Texaco, Chevron, and Mobil, created the Arabian American Oil Company, or Aramco.
>
> Saudi Arabia nationalized Aramco in 1976, giving the Saudi government full ownership of all hydrocarbon reserves and oil facilities in its territory. At first, Aramco remained an incorporated U.S. company and was operated on a fee basis by its four previous owners. However, in 1988 Aramco

ple, is not a subsidiary in the United States of Petróleos de Venezuela, S.A., nor is Petróleos Mexicanos a vassal in its home country of Kerr-McGee Corporation. In short, the failure to find controlling relationships between any of the four national exporters implicated by SDO's petition and any of the Committee companies made the agency resort to the secondary standard of 19 U.S.C. §§ 1671a(c)(4)(B)(i), 1673a(c)(4)(B)(i) inapposite and not in accord with the intent of Congress in enacting it in URAA.

B

In general, the ITA has, and has had, discretion in interpreting and administering the Trade Agreements Act of 1979. And this Court of International Trade and its Court of Appeals for the Federal Circuit have afforded Commerce continuing deference in carrying out its difficult statutory responsibilities. *See, e.g., Nippon Steel Corp. v. United States*, 219 F.3d 1348 (Fed.Cir. 2000); *Mitsubishi Heavy Indus., Ltd. v. United States*, 24 CIT __, Slip Op. 00-97 (Aug. 8, 2000). Indeed, various sections of the Trade Agreements Act, as amended, directly reflect the intent of the legislature in this regard.

(1)

Sections 1671a(c)(4)(B)(ii), 1673a(c)(4)(B)(ii), *supra*, which are at issue herein, state that the ITA "may" disregard the position of domestic producers of a domestic

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became the Saudi Arabian Oil Company (Saudi Aramco), a Saudi-registered, state-owned corporation, by Royal decree.

R.Doc 1, vol. IV, pp. 4-5; vol. VIII, p. 1 (footnotes omitted). Each describes the current standing of the government company under the Saudi Basic Law and its corporate statute. The description does not leave room for the concept of continuing western control, nor is there ground for accepting herein a claim of Saudi control over Exxon/Mobil, Texaco, Chevron, or other multinational producers of crude oil.

like product who are importers of the subject merchandise. In this matter, the agency apparently determined to rely on its inapposite analysis under preceding subsections (c)(4)(B)(i) that the API Ad Hoc Committee companies, *en masse*, would be adversely affected by the imposition of any antidumping or countervailing-duty order and thus to not disregard their opposition to SDO's petition. But the application of subsections (c)(4)(B)(ii) is distinct from that of those preceding subsections and contingent upon the existing facts and circumstances precisely relevant thereto.

Here, the following 1997 domestic production figures (in thousands of barrels of crude oil) for the region represented by SDO were disclosed to the ITA by the Ad Hoc Committee counsel for the 16 members:

ARCO	63,592
BHP Petroleum	1,570
BP Amoco	81,395
Burlington Resources	24,600
Chevron Corporation	71,905
Conoco Inc.	21,320
Exxon Corporation	53,290
Fina, Inc.	3,806
Kerr McGee Corporation	8,760
Marathon Oil Corporation	38,350
Mobil Corporation	44,895
Murphy Oil Corporation	3,650
Occidental Petroleum Corporation	18,980
Phillips Petroleum Company	20,075

Shell Oil Company	100,010
Texaco Inc.	79,244

R.Doc 205. Obviously, the variance is almost one to one hundred (even without any accounting for the results of subsequent government acquiescence in the merger of Exxon and Mobil and now ARCO with BP Amoco). As for imports from the four national exporters singled out herein, SDO claims Committee companies imported millions of barrels (in 1998) as follows:

ARCO	2,329,065
BP Amoco	69,744,565
Chevron Corporation	101,805,000
Conoco Inc.	55,530,735
Exxon Corporation	137,154,955
Fina, Inc.	38,652,040
Marathon Oil Corporation	88,400,000
Mobil Corporation	120,487,595
Murphy Oil Corporation	33,852,655
Occidental Petroleum Corporation	63,480,435
Phillips Petroleum Company	37,707,785
Shell Oil Company	133,330,485
Texaco Inc.	198,559,635

Whatever the precise figures for a particular firm and calendar year[23], the magnitude of U.S. crude oil imports

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[23] *See* R.Docs 198, p. 13; 207, p. 21; 208, p. 11; 210, p. 16; 226, p. 21; 227, p. 9; 229, p. 22; 230, p. 14; 243, p. 14; 244, p. 14; 287, p. 13; 290, p. 15; Plaintiff's Brief, pp. 11, 34. Import figures for these firms for 1997 can be derived from publicly-available data of

from around the world, including Iraq, México, Saudi Arabia and Venezuela, is notorious. In fact, the imports from just those four countries exceeded, if not dwarfed, the above-listed domestic, regional numbers for every individual Committee company save ARCO/BP Amoco.[24]

This phenomenon indicates, of course, and the record supports, that the Committee companies have an interest in this case, but it by no means presages the ITA's determination not to disregard their opposition to SDO's petition. To begin with, the domestic, regional industry which SDO attempts to represent consists of more than 11,000 "independent", smaller-scale enterprises, a majority of whose oil wells and related workers have been at a standstill[25]. Their business, to the extent still viable, is hardly in the same league with the truly global pursuit and production of petroleum and its multiple, finished derivatives by the "integrated", multinational members of the API Ad Hoc Committee. To be sure, such economic disparity, however extraordinary, should not be automatically dispositive under the law governing a case like this, in particular where scale and complexity increase, which is the situation of Committee companies. While Fina, Inc.'s domestic production, for example, is but a fraction of the quantum of its imports, and ARCO's U.S. production exceeds its imports from all four target nations by some 60 million barrels, and the imports of Conoco, Murphy, Occidental and Phillips combined therefrom do not equal those of Texaco

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the Energy Information Administration of the U.S. Department of Energy and are, in most cases, similar to the 1998 numbers.

[24] The record does not reflect imports from the countries in question on the part of BHP Petroleum, Burlington Resources, or Kerr-McGee Corporation.

[25] *Compare* R.Doc 215, p. 7 *with* Tr. at 44-45.

alone[26], the ITA not only acquiesced in the lumping of all those apparently-disparate competitors together, it adopted their Committee's above-quoted, composite arguments as to how "members' interests as domestic producers would be adversely affected by the imposition of antidumping or countervailing duties." 64 Fed.Reg. at 44,482, col. 2. This lump-sum statement was embraced without any reported agency analysis of perceptible elements of any adverse effect due, for example, to political displeasure, real or feigned, on the part of the government of Iraq, México, Saudi Arabia or Venezuela; to duties of say 5 percent as opposed to fifty; to attempted redirection of exports by one or more of those governments; to decreased demand in the United States induced by the prospect of yet another American impost. *Cf.* R.Doc 334 *passim*. Moreover, within the realm of conflict of interest engendered by significant imports on the part of firms also producing in PADDs I-IV but opposing SDO, there was no ITA attempted differentiation between the levels and resultant percentages of those imports, the capacities of Committee companies to draw upon sources available elsewhere on Earth or in this country[27], or the degrees of competition among var-

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[26] *See* R.Docs 205, 226. *But see* Brief of Defendant-Intervenor Texaco Inc., pp. 18-19.

[27] To quote, for example, from the Brief of Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation, pages 15-16, in this regard:

> . . . [T]he major U.S. oil companies were not wedded to the "allegedly dumped imports." They simply had too many alternatives. As the experts explained, crude oil is a worldwide . . . commodity that is produced around the world and sold at prices dictated by the world markets. As the report of the Petroleum Industry Research Foundation indicated, "replacement supplies appear to be readily available." Thus, the major U.S. oil companies did not need to import crude oil

ious members. *Ibid.* In fact, not all of those companies actually subscribed to the composite Committee claim that domestic prices would fall if any antidumping or countervailing duty really were to be imposed. *Compare id.* at 4 *with* R.Doc 82, p. 3 *and* R.Doc 293, third page. Yet, the agency took no final account of any difference of opinion.

When SDO then brought its complaint to this court, as noted above, the API Ad Hoc Free Trade Committee duly moved for leave to intervene as a party defendant, as did member companies BP Amoco, Chevron, Exxon, Mobil, Shell and Texaco, each on its own account. The Committee's motion was granted, but the court, upon reading the ITA's published determination to dismiss summarily SDO's petition, had no basis for determining how intervention of those members would not be redundant, whereupon their individual motions for leave to intervene were denied. *See Save Domestic Oil, Inc. v. United States*, 23 CIT ___, Slip Op. 99-108 (Oct. 12, 1999). Each motion was renewed, gainsaying that the Ad Hoc Committee represented the members on anything more than "common interests", *e.g.*:

> . . . Exxon [ ] relied on the Committee to represent their *common* interests through the Committee's participation in the proceedings before the . . . ITC [ ] and the Department of Commerce . . . .
>
> But while the Committee represented its members' common interests, it did not represent its members on those issues as to which a member's particular facts or circumstances were involved. In this regard, Exxon itself participated actively in the administrative proceeding below, and opposed the

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from the four countries named in the petitions; they could obtain the oil from a variety of other sources at the same prices.

> initiation of an investigation. Toward that end, it submitted Exxon-specific questionnaire responses to both the ITC and the Commerce Department, responded to allegations that pertained solely to Exxon . . . and provided additional Exxon-specific data where it was called for . . . .

Amended Consent Motion of Exxon Corporation to Intervene, pp. 2-3 (emphasis in original). The renewed motions to intervene were thereupon granted, confirming the Committee's inability to represent its members' individual interests.

(2)

As set forth above, the provision in the Trade Agreements Act for disregard of the position of domestic producers of a domestic like product which are importers of the subject merchandise was expanded by the Uruguay Round Agreements Act. And the record indicates that this case is the first in which the ITA declined to disregard importer opposition. *Cf.* Defendant's Brief, pp. 60-67; Tr., pp. 10-11. The Statement of Administrative Action, which issued in conjunction with the URAA enhancement and carries "particular authority"[28], explains:

> Amended sections 702(c)(4)(B)(ii) and 732(c)-(4)(B)(ii) also provide that, as under current practice, Commerce will not apply a bright line test to determine whether a producer who is an importer of the subject merchandise or who is related to an importer of the subject merchandise should be excluded from the domestic industry. Instead, it will look to relevant factors, such as percentage of ownership or volume of imports. For example, the

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[28] H.R. Doc. No. 103-316, vol. I, p. 656 (1994).

> exclusion of a company that imports a small amount of subject merchandise, by comparison with its total production, will depend on whether that company and petitioners have a common stake in the investigation. *See Citrosuco Paulista, S.A. v. United States*, 704 F.Supp. 1075, 1085 (Ct. Int'l Trade 1988).

H.R. Doc. No. 103-316, vol. I, pp. 858-59 (1994). In the case cited with approval, which arose well before adoption of URAA and involved imports of frozen concentrated orange juice from Brazil, the court affirmed the ITA's reliance on 19 U.S.C. § 1677(4)(B), *supra*, to exclude producers from the "domestic industry" that derived a majority of their product from the imports under investigation, that is, in excess of 50 percent. In other words, the agency had taken the position

> that firms with large imports of the allegedly dumped or subsidized merchandise may be excluded from the definition of the domestic industry, because they inherently lack the stake in the final investigation being pursued by the petitioner.

12 CIT at 1206, 704 F.Supp. at 1085.

The parties agree herein that, since enactment of URAA, three other proceedings encumbered the ITA with the issue at bar, two earlier and one subsequent to the determination to dismiss SDO's petition. *See Ball Bearings and Parts Thereof From Thailand; Final Results of Changed Circumstances Countervailing Duty Review and Revocation of Countervailing Duty Order*, 61 Fed.Reg. 20,799, 20,801 (May 8, 1996) ("Objecting Parties cannot be said to have a common 'stake' with the petitioner"); *Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico*, 63 Fed. Reg. 71,886 (Dec. 30, 1998) (opposition to petition by importer from México of some 10-15 percent of its stock

requirements disregarded); *Initiation of Antidumping Investigation: Citric Acid and Sodium Citrate From the People's Republic of China*, 65 Fed.Reg. 1,588, 1,589 (Jan. 11, 2000) ("The Department has disregarded Proctor & Gamble, Inc.'s opposition because . . . they are a major purchaser and user of domestic and imported citric acid and sodium citrate").

This is the first case to have the issue considered anew in court. On its part, the plaintiff takes the position that those three matters reflect "consistent prior practice" and "established precedents"[29], amounting to "traditional practice"[30], and that the ITA had a duty to explain its departure from such prior norm. Plaintiff's Reply Brief, p. 11, citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). The defendant properly recognizes its duty in this regard but also that it "is not obligated to adhere to the same policies over time." Defendant's Brief, p. 62. Accordingly, the ITA did not follow *Citrosuco* "because the peculiarities of the oil industry did not warrant application of the same test." *Id.* at 63. That is, the agency

> found that the facts present in the oil industry required the agency to consider factors other than the level of imports. Specifically, Commerce noted that "oil is a limited, non-renewable natural resource" and that "current U.S. demand cannot be satisfied solely by increasing domestic production; it can be satisfied only through a substantial level of imports." "[W]hen fairly and sympathetically read in the context of the entire opinion of the agency" (*Atchison*, 412 U.S. at 809), these distinctions reveal that Commerce exercised its discretion in the

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29 Plaintiff's Reply Brief, p. 11.

30 *Id.* at 15.

Dismissal Determination in a manner consistent with congressional intent.

Id. at 63-64 (footnote omitted).

While the world of petroleum may well be *sui generis*, this alone does not necessarily confirm that the ITA's approach was consistent with congressional intent. For example, the government's own public data demonstrate that proved domestic reserves were almost four times even last year's gross U.S. consumption.[31] Moreover, domestic production in PADDs I-IV during 1999 nearly equalled the 1,545,866,000 barrels of crude oil imported from Iraq, México, Saudi Arabia and Venezuela and, in fact, exceeded the 1,412,161,000 barrels imported from all other countries. Included in that group is the largest single exporter to the United States, Canada, not an OPEC member. Nevertheless, the government quotes with approval the proposition of the Petroleum Industry Research Foundation, Inc. ("PIRINC") that affirmative relief for SDO in this case "would 'undermine the unity and effectiveness of OPEC, and non-OPEC producers by adding incremental supply to the market' which would, in turn, lead to lower prices." Defendant's Brief, p. 53, quoting R.Doc 269, Exhibit E, p. 3.

Whatever the geological and concomitant political realities, Congress and Commerce both have referred to a "common stake" in the economics underlying a given administrative proceeding as the dispositive test. And whether an importer passes that test in order to have its opposition to a petition for imposition of antidumping or countervailing duties counted necessarily entails ITA

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31 *See* U.S. Energy Info. Admin., *U.S. Crude Oil, Natural Gas, and Gas Liquids Reserves - 1998 Annual Report*, pp. 19-26 (1998). *Cf.* M.A. Adelman, The Genie out of the Bottle, p. xxii (1995) ("World oil shortage is a fiction, but belief in this fiction is a fact"); Thomas Gold, The Deep Hot Biosphere (1999).

consideration of that firm's level of imports and resultant dependency thereon. For the agency not to have administered its test on an individual basis was an abuse of its discretion. As counsel for the API Ad Hoc Committee, itself, argued to the ITA, "expressions of support by oil industry associations are non-probative in these cases". R.Doc 321, p. 5.

C

That argument was directed at associations which sought to support SDO's petition, one of which was the Independent Petroleum Association of America ("IPAA"). It asserted that a "majority of its members engage in the exploration and production of the domestic like product"[32] and therefore that it qualified as an "interested party" under the statute. Responding to an ITA questionnaire, IPAA claimed such status on the ground that a majority of its members have offices in PADDs I-IV but that it was unable to provide production figures for them within that region. *See* R.Doc 148, QR p. 2. Whereupon, the ITA declined to grant IPAA standing. *See* R.Doc 336, pp. 3-4.

The Trade Agreements Act definition of an "interested party" is, in pertinent part, as follows:

> **(C)** a manufacturer, producer, or wholesaler in the United States of a domestic like product,
>
> **(D)** a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,
>
> **(E)** a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,

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32 R.Doc 336, p. 1.

> (F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), (E) with respect to a domestic like product . . . .

19 U.S.C. §1677(9). In tying such status to a domestic like product, clearly Congress intended to provide in a case such as this for associations like IPAA. *See, e.g.*, S.Rep. No. 96-249, p. 90 (1979). And the ITA did not proceed otherwise[33], witness its seemingly-spontaneous embrace[34] of the API Ad Hoc Committee. Rather, the agency properly required IPAA to prove the necessary connection to the regional domestic like product. While IPAA initially was unable to obtain the requisite information, it may still be able to establish on remand that its members are regional producers.

(1)

In enacting URAA, Congress also clearly indicated its intent that "labor have equal voice with management in supporting or opposing the initiation of an investigation." H.R. Rep. No. 103-826, pt. 1, p. 48 (1994).

> If workers are represented by a union, Commerce will count the production of those firms whose workers are represented by the union as being for or against the petition in accordance with the workers' position. If the management of a firm expresses a position in direct opposition to the views of the workers in that firm, Commerce will treat the production of that firm as representing neither support for nor opposition to the petition.

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[33] *See id.* at 2-3.

[34] *Cf.* Letter from Robert J. Heilferty, Esq. to the Court (Aug. 31, 2000).

Id. A regulation of the Department, 19 C.F.R. § 351.203(e)(5) (1999), provides that, in conducting a poll of an industry, the ITA "will include unions, groups of workers, and trade or business associations."

Here, the record reflects an attempt by the agency, pursuant to 19 U.S.C. §§ 1671a(c)(4)(D), 1673a(c)(4)(D), *supra*, to poll each of the 410 largest producers in PADDs I-IV, which account for over 86 percent of the production therein, and 401 of the remaining producers in the region. *See* 64 Fed.Reg. at 44,481-82. The ITA reports receipt of responses from 41 percent of the "companies" comprising the first group and from 18 percent of the sampled 401 "companies". *Id.* at 44,482, col. 1. There is no indication that the agency, contrary to its own regulation and the intent of the governing statute, made any attempt to poll production workers at those particular firms, nor did it otherwise determine where labor stands *vis-à-vis* SDO's petition. *See* R.Doc 215, pp. 8-9; R.Doc 331, p. 2.

The U.S. Department of Labor reports that the petroleum industry experienced a sharp decline in domestic exploration and production and an extended period of downsizing and restructuring, losing almost 390,000 jobs from 1982 to 1995, as contrasted with some 339,000 still existent wage and salary jobs in 1998. U.S. Dep't of Labor Bulletin 2523, *Career Guide to Industries 2000-01 Edition*, p. 34 (Jan. 2000). Moreover, that Department projects an additional, overall 17 percent decline through the year 2008. *Cf. id.* at 35. As for the positions found still active, the Bureau of Labor Statistics reports about 60 percent in 1999 were in just four states, three of which, Louisiana, Oklahoma and Texas, are within the ITA's designated region [*id.* at 34]; more than seven out of ten establishments employ fewer than ten workers, although more than half of all workers

in the industry are employed in settings of 50 or more [*id.*]; and

> [f]ew industry workers belong to unions. In fact, only about 4 percent of workers were union members or covered by union contracts in 1998 . . . .

Id. at 36.

Be that last statistic as it is, the Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, CLC ("PACE") came forward with an expression of support for SDO, whereupon it was served with an ITA questionnaire "to ascertain whether the union qualifies as an interested party and, if so, how to account for its support." R.Doc 337, p. 1. PACE claimed support emanating from members in the employ of ten companies. The ITA disregarded the pipeline workers at four of those firms because they "are involved solely in transporting crude oil" and thus are not "engaged in the production of crude oil (*i.e.*, operating the wells)." *Id.* at 3. That nuance apparently does not exist with respect to the other six companies, but the agency also took no account of their production workers' indicated support of SDO on the ground that their chosen union representative failed to provide requested information, *viz.*:

> . . . [W]ithout production data for the specific facilities at which PACE represents workers engaged in the production of crude oil, we have no way of accounting for its support.

Id.

The plaintiff complains that the ITA should have accounted for the workers' support at all ten firms. It argues that the managements of those companies are possessed of the production data requested by the agency and that their workers "should not have been penalized simply because the data w[ere] wholly in management[ ]

hands." Plaintiff's Reply Brief, pp. 19-20. It claims that, since the agency decided to conduct a poll of the industry, it was arbitrary and capricious to have done so without

> eliciting information about worker support for the petition or . . . determining the production of crude oil by those companies whose workers supported the petition.

Id. at 20. And the plaintiff also argues that pipeline workers are an integral part of the production of petroleum and that the production of the four firms where PACE members work should therefore have been taken into account by the ITA.

Indeed, it is hard to imagine meaningful "production" of the liquid raw material that is crude petroleum oil without its passage through pipe, often arrayed in lines for miles, whether near or in the Persian Gulf, the Gulf of México, or anywhere else, yet the court notes that the workers who man those pipelines are not necessarily classified by the government with their brethren who engage in "oil and gas extraction". *Compare*, *e.g.*, Executive Office of the President, Office of Mgmt. & Budget, North American Industry Classification System - United States 1997, pp. 67-68 (1998) *with id.* at 478-79. This is not to state that, had the ITA counted PACE's members at the four domestic companies involved in transporting crude oil as properly aligned in support of SDO's petition, such approach would have violated the Trade Agreements Act, as amended, *supra*. On the other hand, given that statute and the clear intent of Congress in enacting URAA, this court concludes that it was not in accordance with law for the agency to have failed to account at all for the views of labor in this case.

(2)

Under the statute as set forth above, standing is tied to a domestic like product, which Congress has defined to mean

> a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation[,]

19 U.S.C. § 1677(10), and which the ITA determined to define herein as "crude petroleum oils and oils obtained from bituminous minerals testing at, above, or below 25 degrees A.P.I." 64 Fed.Reg. at 44,480, col. 3. In doing so, the agency confirmed that the class or kind of merchandise to be investigated "normally will be . . . as defined in the petition"[35] and also confirmed that it followed that practice herein, thereby rejecting attempts by interested parties to have refined products and "lease condensates" also considered the domestic like product. *Id.* at 44,481, cols. 2-3. The inclusion of either could have an impact on this case, given the support for, and nature of the opposition to, SDO's petition.

With regard to refined products, there is little on the record to support the proponents of inclusion. Indeed, the plaintiff argues that refining needs and expectations, much of them offshore, are what genuinely motivate the Ad Hoc Committee companies in opposition to its petition, not their domestic production of the raw material SDO's members capture.[36]

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35 64 Fed.Reg. at 44,481, col. 2.

36 *Compare* Plaintiff's Brief, pp. 28-30 *with* R.Doc 82, p. 9 ("If Chevron's access to foreign crude at competitively set market prices is restricted, the cost of operating our U.S. refineries that cannot run domestic crudes efficiently will increase") *and* R.Doc 180, p. 5 ("Shell is vitally concerned with events—such as the extraordinary import duties sought by the petitioner[ ] in these proceedings—that threaten . . . to deprive Shell's refining operations of access to essen-

Be that part of the ITA's determination as it is, Committee companies also urged the inclusion of "lease condensates", which position engendered the following reported discussion:

> The issue of whether "lease condensates" are included properly within the domestic like product is more complicated. Lease condensates consist essentially of a mixture of certain hydrocarbon compounds that, in terms of weight and complexity, fall between natural gas and crude oil. They are liquids formed from natural gas as a result of temperature or pressure changes. Often lease condensates are mixed with crude oil and the resulting mixture is sold to a refinery as crude oil.
>
> The petitioner argues that the Department should not include lease condensates in the domestic like product because the mixture of hydrocarbon compounds in lease condensates is different from the mixture of hydrocarbon compounds in crude oils. Consequently, it asserts, lease condensates can only be refined into a limited range of products. Opposing the petitioner's position, other parties have argued that lease condensates are very similar in physical characteristics and uses to light crude oil and that, when mixed, they simply become an indistinguishable part of the crude-oil stream which is sent to the refinery.

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tial crude oil supplies") *and* Confidential Record Document ("ConfDoc") 49, p. 2 ("the imposition of additional tariffs or countervailing duties would have the potential of negatively impacting domestic refiners. Phillips . . .") *and* ConfDoc 79, p. 61 ("These duties would increase Mobil's supply and production costs for gasoline, aviation fuel, lubricants and other petroleum products and petro-chemicals in the United States").

> In addition to the extremely complex technical nature of the issue, ascertaining the precise nature of available production and distribution data as well as attempting to establish the appropriate analytical framework for a very diverse industry has been problematic for the Department. However, it is not necessary to decide this issue because . . . we have determined that the petitioner does not have the requisite industry support, regardless of how the issue of lease condensates is resolved.

Id. Given that this case must be remanded for reconsideration by the agency, decision of this issue may become necessary. For example, if, as SDO contends, lease condensates are not found in its members' domestic product, but prove to be part of the product obtained domestically by Committee companies, then that part may have to be discounted in the opposition of those producers to the petition.

III

Perhaps, the "extremely complex technical nature" of the lease-condensates issue was exacerbated by the limited time afforded the ITA by the statute. But expeditious, generally-affirmative initial action, has been the mandate of Congress since 1979. That is, the intent of the Trade Agreements Act has been that the agency

> act upon all petitions which, based upon facts reasonably available to petitioner, make reasonable allegations of the presence of the elements necessary for the imposition of a . . . duty . . . . Consequently, the Committee expects that the [ITA] will act upon most petitions, rejecting only those which are clearly frivolous, not reasonably supported by

> the facts alleged or which omit important facts which are reasonably available to the petitioner.

H.R. Rep. No. 96-317, p. 51 (1979). And this expectation of Congress has been realized almost one thousand one hundred times since then, with only one petition having been summarily rejected over the past 20 years on reasoning remotely similar to that herein, and notwithstanding subsequent judicial appreciation of the ITA's limited time for rendering a determination. *E.g.*, *Fujitsu Ltd. v. United States*, 23 CIT ___, ___, 36 F.Supp.2d 394, 401 (1999), and cases cited therein.

Of course, the fact that at least preliminary ITA (and ITC) investigation ensues in the "vast majority of cases", to quote from the reported URAA contemplation of Congress regarding initial agency time to consider petitions upon filing, H.R. Rep. No. 103-826, pt. 1, p. 49 (1994), does not necessarily lead to any affirmative final antidumping or countervailing-duty relief. And this court is neither at liberty nor able to project the outcome(s) of any agency investigation(s) in this case, which may genuinely entail phenomena beyond the hale of the 1979 Act. Suffice it to state at this stage, however, that the ITA's dismissal of SDO's petition, as described and discussed above, was not in accordance with law. Ergo, plaintiff's motion for judgment upon the agency record developed to date must be, and it hereby is, granted.

This case is hereby remanded to Commerce for contemplation of commencement of a preliminary investigation by its ITA (and referral for such an investigation by the ITC) in accordance with law, as set forth herein above. The defendant may have 60 days from the date hereof for this purpose. To the extent, in the exercise of its sound discretion during that time, the agency determines to reconsider its analysis of any of the threshold issues raised by the petition, including the nature of

SDO's domestic product *vis-à-vis* that of other domestic producers and support for, and opposition to, the petition on the part of domestic producers and workers, the ITA may call upon the interested parties to supplement the record, and also upon the U.S Departments of Labor and of Energy for relevant, publicly-available data not yet part of the record. If the stated opposition of the API Ad Hoc Free Trade Committee is still sought to be taken into account, the agency is hereby directed to consider the facts and circumstances of the business of each Committee company, standing on its own, including most necessarily that particular company's imports of crude petroleum oil from Iraq, México, Saudi Arabia or Venezuela.

If the result of this remand is not initiation of preliminary investigation(s) by the ITA (and the ITC), the written reasons therefor are to be filed with the court on or before the close of the aforesaid 60-day period, whereupon the parties hereto may have 30 days to serve and file comments thereon, with any replies thereto due within 15 days thereafter.

So ordered.

Decided: New York, New York
September 19, 2000

THOMAS J. AQUILINO, JR.
Judge

MOTION FILED
DEC 2 1 2001

(2)

No. 01-684

IN THE

Supreme Court of the United States

UNITED STATES COURT OF INTERNATIONAL TRADE,
Petitioner.

v.

UNITED STATES, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* SAVE DOMESTIC OIL, INC.

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF RESPECTING CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, Save Domestic Oil, Inc. ("SDO") hereby moves for leave to file the accompanying *amicus curiae* brief addressing whether this Court should grant review of the questions presented in the petition in this case.

The accompanying brief comports with the text and purpose of Rule 37.1 in that it "brings to the attention of the Court relevant matter not already brought to its attention by the parties." Specifically, the accompanying brief identifies what we believe to be the most critical flaw in the reasoning of the Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit") in its underlying decision in Misc. Docket No. 01-679. The underlying proceeding focused on the failure of the U.S. Department of Justice and U.S. Department of Commerce ("Defendants") to comply with an order of the U.S. Court of International Trade while their request to stay that order was pending at the Federal Circuit. However, the Federal Circuit's opinion in No. 01-679 did not address whether this failure to comply could serve as the basis for criminal contempt proceedings.

This brief also provides the Court with 1) additional case law supporting the right of a court to enforce its orders, 2) additional information regarding the injury suffered by Save Domestic Oil as a result of the improper interlocutory appeal by Defendant United States to the Court of Appeals for the Federal Circuit, and 3) an explanation of why the Supreme Court should consider whether the Federal Circuit's recent decisions regarding interlocutory appeals serve to weaken what has been a consistent precedent across all of the circuits.

The Petition for Writ of Certiorari was docketed on November 8, 2001. On December 5, 2001, the Court ex-

tended the deadline for all responses to December 21, 2001. Therefore, this motion and the accompanying brief are timely filed. S. Ct. R. 37.2(a).

Save Domestic Oil, Inc., does not consider itself to be a "party" to this proceeding for purposes this submission. Black's Law Dictionary defines a "party" to an action as "a person whose name is designated on record as plaintiff or defendant." BLACK'S LAW DICTIONARY 1122 (6th ed. 1990). The same definition further states: "'Party' is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or equity, the party plaintiff or defendant . . .; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties." *Id.*

As stated in the Petition, this proceeding stems from an August 10, 2001, show cause hearing, at which Judge Aquilino asked Defendant United States to appear. Petition at ii. Save Domestic Oil was a party to the original anti-dumping and countervailing duty proceeding that led to the show cause hearing. However, counsel appeared at the hearing on August 10, 2001, as the representative of an interested person, not a party, since the focus of the proceeding was the failure of the United States to follow an order of the Court, not the merits of the antidumping action.

Similarly, Misc. Docket No. 679, which directly preceded the Petition for Writ of Certiorari, involved a Petition for Writ of Mandamus by Defendant United States to the Court of Appeals for the Federal Circuit. SDO entered an appearance and filed responses as a part of these proceedings, but again, its role was subsidiary and limited to advising the CAFC of its interest in the underlying unfair trade investigation and appeal. While SDO has a clear interest, it is simply not the focus of these proceedings.

Given the highly unusual nature of the underlying proceedings and the ambiguity of Rule 12.6 in this particular situation, SDO felt it appropriate to proceed as an amicus, which requires the additional burden of obtaining consent from all parties.

Petitioner and the United States have consented to the filing of the accompanying brief. The written consent of each party's counsel is attached to the Certificate of Service filed simultaneously herewith. SDO's position is that these are the only "parties" to the proceedings, and thus this Motion is not necessary. However, should SDO and other participants in the proceedings below be considered "parties" to this proceeding under Rule 12.6, the following other participants have withheld consent or taken no position: Saudi Arabian Oil Company, Petroleos Mexicanos, P.M.I. Comercio International S.A. de C.V., Pemex Exploracion y Produccion, Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation. Thus, we include this motion for leave to file the attached *amicus* brief.

For the reasons described above, Save Domestic Oil as movant here has an important stake in the Court's disposition of the instant petition, because resolution of this matter will allow SDO's underlying appeal to proceed. *See* Petition at 25. Accordingly, this Court should grant this motion for leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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IN THE

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UNITED STATES COURT OF INTERNATIONAL TRADE,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* SAVE DOMESTIC OIL, INC.

INTEREST OF *AMICUS CURIAE*

Save Domestic Oil, Inc. ("SDO"), is an incorporated consortium of independent domestic crude oil producers formed for the purpose of petitioning the U.S. Department of Commerce and the U.S. International Trade Commission in June 1999 for relief from unfairly traded imports of crude oil.[1] SDO was a respondent in Miscellaneous Docket No. 679, *In re United States*, which resulted in a September 28, 2001, *per curiam* decision by the U.S. Court of Appeals for the Federal Circuit. ("In re United States"). This decision was the subject of a Petition for Writ of Certiorari filed with this Court on November 8, 2001, on behalf of the U.S.

[1] This brief was wholly authored by counsel for *amicus curiae* Save Domestic Oil, Inc., as listed on its cover, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Court of International Trade, ("Court of International Trade" or "CIT") by Thomas J. Aquilino, Jr., a Judge of the Court.

We do not take a position on the merits of the Court of International Trade's criminal contempt inquiry. However, we believe that the underlying issue—compliance with and enforcement of judicial orders—merits consideration by this Court.

SUMMARY OF ARGUMENT

The U.S. Government has failed to comply with an order of the Court of International Trade. The order, issued by Judge Aquilino of the U.S. Court of International Trade, directed the government to initiate antidumping and countervailing duty investigations on or before November 18, 2000, or to provide remand results by that time. The government did neither, instead appealing the CIT's decision to the Court of Appeals for the Federal Circuit. The government requested, but did not obtain, a stay of the CIT's order pending the interlocutory appeal. The government was not in compliance with the CIT's order for approximately 260 days.

In view of this failure to comply with the Court's lawful order, it was not an abuse of discretion for the CIT to initiate proceedings to determine whether any government officials should be charged with contempt. It was, however, an abuse of discretion for the Federal Circuit to grant the government's petition for a writ of mandamus, and to direct the CIT to vacate its orders initiating the contempt inquiry.

Because the CAFC's opinion in *In re United States* contradicted its opinion in *Save Domestic Oil v. United States*, undermined a long line of precedent disfavoring interlocutory appeals, and permitted delay that has injured SDO, its decision should be reversed.

ARGUMENT

I. A COURT MAY TAKE ALL APPROPRIATE STEPS TO ENSURE THAT ITS ORDERS ARE ENFORCED

As stated by the United States Court of International Trade in its Petition for Writ of Certiorari, all orders and judgments of courts must be complied with promptly. This Court's opinions on this subject have consistently reinforced this position:

> [T]he basic proposition [is] that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Maness v. Meyers, 419 U.S. 449, 458-459 (1975). Here, the U.S. Government chose to "risk criminal contempt" by refusing to comply with the order of the CIT even though no stay had been granted. *Id.*

The U.S. Government argues that the criminal proceedings were in response to its decision to appeal. But this assertion is incorrect. It was the failure of the U.S. Government to comply with the Court's order after the CAFC failed to act on the motion of a stay that led to the CIT order. It is not disputable that the pendency of an appeal does not alter the duty of defendants with regard to an order issued by a court:

> It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to

> be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Howat v. Kansas, 258 U.S. 181, 190 (1922). Since the CAFC failed to act on the motion for stay, the U.S. Government had no justification for its failure to comply with the CIT's order. This failure was the focus of the proceedings before the CIT.

In its *per curiam* opinion, the Federal Circuit denied the Court of International Trade the ability to enforce its orders and judgments. By granting an extraordinary writ of mandamus, and then by determining that the CIT's initiation of contempt proceedings was an abuse of discretion, the appellate court precluded the Court of International Trade from ensuring that its orders in this case were respected and followed by the U.S. Departments of Justice and Commerce.

The Federal Circuit's opinion states that the remedy of mandamus is available "only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power." *In re United States*, No. 679 (Fed. Cir. Sept. 28, 2001) (Pet. App. A, p. 3a). However, the appellate court then usurps the CIT's power, concluding that the lower court may not even initiate criminal contempt proceedings to enforce its own orders. Before any fact-finding has begun, the appellate court has declared such an inquiry to be unlawful. This is particularly troubling because, as explained in Part II, *infra*, the appellate court did not address the key issue of concern to the CIT when it initiated its contempt inquiry.

II. THE FEDERAL CIRCUIT'S OPINION FAILED TO CONSIDER DEFENDANTS' FAILURE TO OBTAIN A STAY PENDING APPEAL

The Federal Circuit's brief opinion in *In Re United States* does not address the most crucial aspect of the current proceeding. In its *per curiam* opinion, the Federal Circuit writes:

> Contempt proceedings should not be initiated unless in response to action that is clearly unjustified. *Filing a notice of appeal and seeking a stay in this case were not clearly unjustified.*

In re United States (Pet. App. A, p. 3a) (emphasis added). In the next paragraph, the appellate court reaches the same conclusion:

> Thus, the [Defendants'] determination to seek review of the remand order in this case, and the government's request for a stay of that remand order, cannot serve as a basis for criminal contempt proceedings.

Id. (App. A, p. 4a.) But the central issue before the CIT was neither the government's decision to appeal, nor its decision to request a stay. It was the government's failure to act when the stay request was not granted. Defendants, despite "seeking a stay," never in fact received a stay. The Court of International Trade quickly denied the government's motion, and the Federal Circuit never acted on it. (Interestingly, the Federal Circuit's *per curiam* decision in *In Re United States* does not even acknowledge that there was a stay request pending before it for approximately 260 days, or that it took no action on the stay request during this time.)

Defendants did not take sufficient steps to ask the Federal Circuit to act on their stay request. More importantly, Defendants did not take any steps to comply with the CIT's order of September 19, 2000, in *Save Domestic Oil, Inc. v.*

United States while their request to stay that order was pending at the CAFC.[2] This order required the Commerce Department to initiate the unfair trade investigations that were the subject of Save Domestic Oil's petitions or, in the alternative, to provide remand comments to the CIT explaining why it would not initiate such investigations.

In view of this failure to comply with its lawful order, it was not an abuse of discretion for the CIT to begin proceedings to determine whether there is a basis for contempt charges. We take no position on the merits of the issues that would be raised by these proceedings, but it was improper and an abuse of discretion for the Federal Circuit to deny the right of the Court of International Trade to enforce its own orders. The Federal Circuit should not have granted the government's petition for writ of mandamus. Indeed, the Federal Circuit has undermined this Court's rulings in *Maness v. Meyers*, *Howat v. Kansas*, and other related cases, in effect by permitting an interlocutory appeal and an ungranted stay request to function as a *de facto* stay.

III. THE GOVERNMENT AND THE CAFC'S FAILURE TO ACT HAS HARMED SAVE DOMESTIC OIL

These proceedings have not occurred in a vacuum. The delays that have occurred in this case have harmed the original petitioner, Save Domestic Oil. SDO was, and is, disturbed by the delay and expense caused by the Government's interlocutory appeal to the Federal Circuit, and it has suffered harm as a result.

The Government's interlocutory appeal, the CAFC's failure to act on the government's stay request, and the Government's failure to act in the absence of a granted stay,

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[2] *See Save Domestic Oil, Inc. v. United States*, 116 F. Supp. 2d 1324 (CIT 2000). Pet. App. D.

have left SDO without recourse to U.S. unfair trade remedies during the interim period. Even today, more than two years after SDO filed its petitions, the initiation of antidumping and countervailing duty investigations appears no closer than it did in June 1999.

Indeed, further delay appears likely. On December 17, 2001, defendant-intervenors Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation filed a motion to disqualify Judge Aquilino from the ongoing proceedings in *Save Domestic Oil, Inc. v. United States*, based on his filing of the Petition for Writ of Certiorari. Intervenors' Motion to Disqualify, No. 99-09-00558 (CIT Dec. 17, 2001).

IV. THIS COURT SHOULD CLARIFY THE FEDERAL CIRCUIT'S POSITION REGARDING INTERLOCUTORY APPEALS

Defendants' interlocutory appeal was inappropriate and unsupported by precedent, as the first Federal Circuit panel readily concluded. However, in its *per curiam* opinion issued as *In re United States*, the Federal Circuit justifies the U.S. Government's interlocutory appeal by citing several prior instances where such appeals were permitted. These cases include *Adams v. Principi*, 256 F.3d 1318, 1321 (Fed. Cir. 2001), *Southern California Edison Co. v. United States*, 226 F.3d 1349, 1355 (Fed. Cir. 2000), *Dambach v. Gober*, 223 F.3d 1376, 1379 (Fed. Cir. 2000), and *Travelstead v. Derwinski*, 978 F.2d 1244, 1248 (Fed. Cir. 1992). *In re United States* (Pet. App. A, pp. 3a-4a).

These cases were readily distinguishable from Defendants' appeal. Each addressed the merits of the case and involved an issue that could have evaded review on appeal; the Government's interlocutory appeal did neither. Even so, however, it is notable that three of the four cases cited by Defendant United States to justify its appeal were decided by the Federal Circuit within the last two years. This apparent

trend toward allowing interlocutory appeals, even in circumstances that the courts may attempt to limit to specific facts—is a disturbing one.

The law of every Circuit is plain on the question of interlocutory appeals: the courts have no jurisdiction over such appeals. *See* Pet. at 16-17; *Save Domestic Oil, v. United* States, 122 F.Supp.2d 1375, 1377-78 (CIT 2000), (Pet. App. C) (citing six Federal Circuit cases and case law in every other federal judicial circuit). To the extent that *In re United States* undermines this clear line of precedent, it should be vacated.

There is a strong public policy interest here as well: Interlocutory appeals should not be used by federal agencies to avoid making difficult policy judgments. The crude oil petitions were extremely sensitive and generated almost unprecedented controversy upon their filing. After Judge Aquilino's order was issued in the first SDO appeal, the Commerce Department faced a difficult decision: whether to initiate a politically charged case or to again reject SDO's petitions (and its own precedent for initiating such petitions). But instead of confronting this decision, the agency decided to delay, by seeking a stay at the Court of Appeals for the Federal Circuit.

Such avoidance is impermissible. This Court should clarify that interlocutory appeals are prohibited, absent extraordinary and compelling circumstances. Because the CAFC's opinion in *In re United States* contradicted its opinion in *Save Domestic Oil v. United States*, undermined a long line of precedent disfavoring interlocutory appeals, and permitted delay that has injured SDO, its decision should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Federal Circuit should be reversed.

Respectfully submitted,

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(3)

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No. 01-684

In the Supreme Court of the United States

UNITED STATES COURT OF INTERNATIONAL TRADE,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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30 PP

QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit properly exercised its mandamus authority to halt criminal contempt proceedings initiated by the United States Court of International Trade (CIT) against federal officials who had participated in the decision to take an appeal from an earlier order of the CIT in the same case.

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UNITED STATES COURT OF INTERNATIONAL TRADE, PETITIONER

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UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals granting mandamus relief (Pet. App. 1a-4a) is unreported. The opinions of the United States Court of International Trade (CIT) appointing a special prosecutor (App., *infra*, 6a-9a) and directing the United States to show cause why it should not be formally cited for contempt of court (App., *infra*, 1a-5a) are unreported. An earlier opinion of the court of appeals (Pet. App. 5a-8a) is unreported. Earlier opinions of the CIT (Pet. App. 9a-20a, 21a-61a) are reported at 122 F. Supp. 2d 1375 and 116 F. Supp. 2d 1324.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2001. The petition for a writ of certiorari was filed on November 8, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). There is a substantial question whether petitioner has properly invoked this Court's jurisdiction. See pp. 18-22, *infra*.

STATEMENT

1. The contempt proceedings in this case arose out of litigation over petitions filed by Save Domestic Oil, Inc. (SDO), a consortium of independent domestic crude petroleum producers, with the United States Department of Commerce's International Trade Administration (ITA) for imposition of antidumping and countervailing duties on oil from four foreign countries. The Tariff Act of 1930, as amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, requires the ITA to initiate an investigation if it determines that such a "petition has been filed by or on behalf of the industry." 19 U.S.C. 1671a(c)(1)(A)(ii), 1671a(c)(2) (countervailing duties); 19 U.S.C. 1673a(c)(1)(A)(ii), 1673a(c)(2) (antidumping). If the ITA determines that the petition has not been filed "by or on behalf of the industry" within the meaning of the Act, it is required to "dismiss the petition, terminate the proceeding, and notify the petitioner in writing of the reasons for the determination." 19 U.S.C. 1671a(c)(3); see also 19 U.S.C. 1673a(c)(3). The ITA dismissed SDO's petition on the ground that it did not have the statutorily-required support of the domestic industry. 64 Fed. Reg. 44,480 (1999). After surveying the industry, the ITA determined that the relevant opposition ranged from "65 to 68 percent" of the industry. *Id.* at 44,482.

SDO appealed the ITA's decision to the United States Court of International Trade (CIT), and the case was assigned to Judge Thomas J. Aquilino, Jr. On September 19, 2000, the CIT vacated the agency's decision. Pet. App. 21a-61a. The court held that the ITA had applied incorrect legal standards in determining whether SDO's petition had the required industry support, *id.* at 35a-59a, and that the agency's dismissal of the petition therefore "was not in accordance with law," *id.* at 60a. The CIT remanded the case to the agency "for contemplation of commencement of a preliminary [antidumping] investigation," and gave the government "60 days from the date hereof for this purpose." *Ibid.* The court stated that "[i]f the result of this remand is not initiation of [a] preliminary investigation[] * * *, the written reasons therefor are to be filed with the court on or before the close of the aforesaid 60-day period." *Id.* at 61a.

2. The government appealed the CIT's order to the United States Court of Appeals for the Federal Circuit. The government also requested a stay pending appeal from the CIT and moved to extend the time in which the agency was required to respond to the CIT's decision. On November 27, 2000, the CIT denied both motions. Pet. App. 9a-20a. On that same date, the government filed a motion for a stay pending appeal in the Federal Circuit. On December 7, 2000, after no action had been taken on its stay motion, the government filed a motion in the court of appeals seeking a temporary stay pending disposition of its stay motion. The Federal Circuit took no action on either of the government's stay motions during the period of time that the case was pending in the court of appeals.

On July 31, 2001, the court of appeals issued an order dismissing the government's appeal for lack of

jurisdiction. Pet. App. 6a-8a. The court stated that "[a]s a general matter, remands to administrative agencies are interlocutory orders and are not appealable because they do not meet the requirement of finality." *Id.* at 7a. Although the court of appeals recognized that "certain remand orders have been determined to meet the finality requirement," it held that the CIT's order in this case did not fall within "the small class of decisions excepted from the final judgment rule." *Ibid.* The court explained that because the CIT had "remanded to Commerce for *contemplation* of commencement of a preliminary investigation," the remand order "did not conclusively determine a disputed question." *Id.* at 8a. The court of appeals further held that the government's request for a stay was moot, and it ordered each side to bear its own costs. *Ibid.*[1]

Upon receiving notice of the Federal Circuit's decision, the government requested a seven-day extension of time from the CIT in which to respond to the September 19, 2000, remand order. The government explained that the requested extension of time was necessary for the newly-confirmed Assistant Secretary

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[1] The government argued in the court of appeals that the CIT's September 19, 2000, remand order satisfied the finality requirement of 28 U.S.C. 1295(a)(5). The government explained that if the ITA applied the legal standards set forth in the remand order, and concluded that under those standards an investigation was required, the ITA would not be able to appeal from its own decision to commence an investigation and the disputed legal issue might evade appellate review. Cf. *Dambach* v. *Gober*, 223 F.3d 1376, 1379 (Fed. Cir. 2000) (order remanding to an agency is appealable "when there is a statutory interpretation that will affect the remand proceeding and that legal issue might evade our future review").

for Import Administration to review the staff analysis that had been prepared in response to the court's remand order. The CIT granted the requested extension of time. App., *infra*, 3a-4a. The court also stated, however, that neither the government's motion, "nor anything else on the record of this case to date, dispels the * * * inability of the court to conclude that the defendant has not been dilatory and contemptuous." *Ibid.* The court's order further stated that "the defendant is also hereby directed to appear before the undersigned [judge] in courtroom 3 at 11 a.m. on that date [August 10, 2001] to show cause, if there be any, why it should not be formally cited and sanctioned for contempt of court, commencing on or about November 20, 2000." *Ibid.*

3. At the show-cause hearing on August 10, 2001, the CIT alluded for the first time to the possibility that individual government officers and employees might be held in criminal contempt. The CIT began the hearing by reading the following statement:

> We convene today pursuant to the Order to Show Cause filed in this matter on Monday August 6, 2001, which has engendered two motions; one by the defendant for reconsideration of that order. The other motion is the Court's own, to wit: That David M. Cohen, A. David Laifer, Lucius B. Lau, Robert J. Heilferty, and all those other officers and employees of the Defendant, United States Government, who, within the meaning of Sections 401 and 402 of Title 18 of the United States Code, have not obeyed and/or who have willfully resisted lawful compliance with the Court's Order of Remand of September 19, 2000, to the International Trade Administration, U.S. Department of Commerce, draw near and be

heard as to why they, and each of them, should not be punished to the extent permitted by law.

Tr. 3.[2]

During the hearing, the CIT repeatedly requested government counsel to provide the names of those officials at the Department of Justice and the Department of Commerce who had participated in the government's decision to pursue an appeal of the remand order. See, *e.g.*, Tr. 18-22, 30-31. The court inquired, for example, whether "the Solicitor General himself" had participated in the decision to appeal and stated that this was "a question, of course, that will require an answer." Tr. 7.

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[2] The CIT's August 6 order directed "the defendant" to show cause "why *it* should not be formally cited and sanctioned for contempt of court." App., *infra*, 4a (emphasis added). As the caption of the CIT's August 6 order (*id.* at 1a) makes clear, the United States rather than any individual government attorney is the "defendant" in the underlying case. After the CIT indicated at the beginning of the August 10 hearing that the court intended to address the possibility of punishing individual federal officers and employees, government counsel stated that he was prepared to address the question whether the United States should be held in contempt, but that he did not believe the government had received adequate notice of the court's intention to consider contempt proceedings against individual government officials. Tr. 3-5. Counsel further noted that he appeared in the court as the attorney of record for the United States but did not represent other government attorneys in their individual capacities. Tr. 17. The CIT stated, however, that in its view the order read into the record at the beginning of the August 10 hearing "was simply a furtherance of" the August 6 order. Tr. 5; see Tr. 21 (CIT states that "the Court's Order to Show Cause on Monday [August 6] was sufficient notice of the direction that this particular session was to take").

The government has lodged a copy of the transcript of the August 10, 2001, hearing with the Clerk of this Court.

Lead counsel for the government stated that he was not sure that he knew all the officials involved in the decision to appeal and that, even as to names of which he was aware, he believed it necessary to postpone answering the CIT's inquiries pending more extended consultation with responsible officials at the Department of Justice. See Tr. 18-22. An attorney for the Department of Commerce who also attended the hearing stated that he was in no better position to provide the requested information. Tr. 35. In response, the CIT ordered both government counsel incarcerated pending a further hearing to commence at 4:00 P.M. that same day. See Tr. 37-38, 41. At the later hearing, the CIT received the government's commitment to provide the requested names. Tr. 45-46. The CIT released the two attorneys from custody and directed the government to provide, by no later than Friday, August 17, 2001, the names of all federal officers and employees who had participated in the decision to appeal the remand order. Tr. 46.[3]

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[3] As petitioner points out (Pet. 25 n.7), the two individual government attorneys who were incarcerated at the August 10 hearing have filed notices of appeal challenging the CIT's action. Petitioner contends (*ibid.*) that "[t]hose filings (by mail) appear to be yet another example of practice on the fringe" because the notices of appeal were received by the CIT Clerk after the 60-day period for appeal had expired. CIT Rule 5(e) provides, however, that "a pleading or other paper mailed by certified or registered mail properly addressed to the clerk of the court, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of mailing." The notices of appeal filed by the two individual attorneys were sent by certified mail, return-receipt requested, on October 9, 2001 (the 60th day after the August 10 hearing) and are therefore timely under the CIT's Rules. The CIT's docket sheet indicates that both notices of appeal were deemed filed on October 9.

On August 17, 2001, the government filed its response to the inquiries made by the CIT at the August 10 hearing. *Inter alia*, that filing identified, by name and title, 12 current and former officials of the Department of Justice (including the former Solicitor General) and eight current and former officials of the Department of Commerce who had participated in the decision to take the appeal in the case. In a separate filing submitted to the CIT on the same date, the government responded to the court's show-cause order, arguing that under the circumstances of the case there was no basis for initiating criminal contempt proceedings against those individuals or any other Department of Commerce or Department of Justice official. The government also argued that, under this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), it would be inappropriate for the CIT to appoint a private prosecutor without first affording the Attorney General of the United States or the Assistant Attorney General for the Criminal Division an opportunity either to (1) assume responsibility for investigating and prosecuting the alleged criminal offense, or (2) assign the matter to a United States Attorney. Also on August 17, 2001, the government filed a petition for a writ of mandamus in the Federal Circuit, asking that court to vacate the CIT's August 6 and August 10 orders insofar as those orders had initiated criminal contempt proceedings and to prohibit any further criminal contempt proceedings in this matter.

4. On August 21, 2001, the CIT ordered the appointment of a special prosecutor. App., *infra*, 6a-9a. Both the caption and the body of that order listed by name the Justice and Commerce Department officials who had been identified by the government as participants

in the decision to appeal the CIT's September 19, 2000, remand order. *Id.* at 6a, 8a. The CIT named Terence P. Stewart of Washington, D.C., as special prosecutor "to investigate and to report on the decision of the defendant and its officers and employees, including but not necessarily limited to the above-named relators, to not obey and/or to willfully resist lawful compliance with the court's interlocutory order of remand of September 19, 2000." *Id.* at 8a. In light of the CIT's appointment of a special prosecutor, the government filed a supplemental petition for mandamus in the Federal Circuit.

5. On August 23, 2001, the court of appeals temporarily stayed further proceedings in the matter. App., *infra*, 10a-11a. On September 28, 2001, the court granted the government's petition for mandamus. Pet. App. 1a-4a.

While acknowledging that "mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power," the court of appeals "agree[d] with the United States that its determination to file an appeal of the Court of International Trade's remand order was not under the circumstances sufficient to serve as a basis for contempt proceedings." Pet. App. 3a. The court explained that

> [p]recedent regarding the appealability of remand orders such as that in the present case is not crystal clear, and the government's arguments offered in support of appealability were not frivolous. Contempt proceedings should not be initiated unless in response to action that is clearly unjustified. Filing a notice of appeal and seeking a stay in this case were not clearly unjustified.

Ibid. The court of appeals also observed that under Federal Circuit precedent, "some remand orders may

be considered final for purposes of appellate jurisdiction." *Ibid.*; see *id.* at 3a-4a (citing cases). The court concluded that "[t]he trial court's orders to initiate contempt proceedings were * * * an abuse of discretion," and it granted the government's mandamus petition "to the extent that the Court of International Trade is directed to vacate its orders initiating criminal contempt proceedings." *Id.* at 4a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Because "the contempt power * * * is uniquely liable to abuse," *International Union, United Mine Workers of America* v. *Bagwell*, 512 U.S. 821, 831 (1994) (internal quotation marks omitted), "only '[t]he least possible power adequate to the end proposed' should be used in contempt cases," *United States* v. *Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson* v. *Dunn*, 19 (6 Wheat.) U.S. 204, 231 (1821)); see also *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 801 (1987). That principle of restraint applies with special force to criminal contempt proceedings against attorneys, given that "[c]riminal contempt of court is a dark stain on an attorney's record." *United States* v. *Mottweiler*, 82 F.3d 769, 770 (7th Cir. 1996).

In this case, the court of appeals exercised appropriate vigilance by halting unwarranted criminal contempt proceedings. The court recognized that the CIT had abused its authority by instituting contempt proceedings because the actions by the government and its officials in taking the appeal "were not clearly unjustified." Pet. App. 3a. As the court of appeals explained,

"[p]recedent regarding the appealability of remand orders such as that in the present case is not crystal clear, and the government's arguments offered in support of appealability were not frivolous." *Id.* at 3a.[4] The court of appeals thus properly rejected the proposition that, simply because an appeal is ultimately dismissed for lack of jurisdiction, the government and the individual officials who participated in the decision to take the appeal may be prosecuted for criminal contempt based on their "disobedience" to the underlying order from which the appeal was taken.

It was, moreover, particularly appropriate for the court of appeals to resolve the threshold question in the contempt proceeding regarding the propriety of the prior appeal, because the conduct involved in the taking of the appeal (following the filing of the notice of appeal) occurred before the court of appeals, not the CIT. Indeed, the CIT, by instituting contempt proceedings on that ground, would appear to have usurped the authority of the court of appeals to determine whether the appeal was frivolous. See Fed. R. App. P. 38.

In addition to the ground on which the court of appeals relied, the CIT's appointment of a special prosecutor was improper because the CIT failed to provide responsible Department of Justice officials an opportunity to assume responsibility for the criminal investigation and any ensuing prosecution. This Court in *Young* explained that "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. Such a

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[4] The Federal Circuit panel that dismissed the initial appeal did not find that the appeal was frivolous, and it ordered each side to bear its own costs. Pet. App. 8a.

procedure ensures that the court will exercise its inherent power of self-protection only as a last resort." 481 U.S. at 801. Although the government brought *Young* to the CIT's attention in its August 17, 2001, filing (see p. 8, *supra*), the CIT's August 21 order appointing a special prosecutor (App., *infra*, 6a-9a) did not cite *Young* or explain the court's refusal to refer the matter to the Department of Justice.[5]

2. Petitioner suggests that the court of appeals' ruling permits parties in cases before the CIT "to completely disregard or willfully disobey lawful orders

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[5] On August 30, 2001, in response to the government's petition for mandamus, the CIT filed in the Federal Circuit a document styled "Statement on Behalf of the United States Court of International Trade." That Statement likewise did not cite *Young* or directly address the government's contention that the matter should first have been referred to the Department of Justice. The CIT's filing did, however, characterize the government's mandamus petition as "an extraordinary indication that the government will not assist the CIT in securing the just, speedy, and inexpensive determination of this matter mandated by CIT Rule 1." *Id.* at 8. The court further stated that "[t]he Commerce and Justice Departments have been and continue to be partisans in this matter." *Ibid.* Those assertions provide no basis for the CIT's refusal to adhere to the procedure described in *Young*. The Department of Justice is fully authorized to investigate and prosecute individual federal officers and employees who are believed to have committed criminal offenses. See 28 U.S.C. 535(a) ("The Attorney General and the Federal Bureau of Investigation may investigate any violation of title 18 involving Government officers and employees."). Accordingly, as the government's reply in the Federal Circuit pointed out, "it is for the Department of Justice in the first instance to determine whether the involvement of Justice Department attorneys in representing the United States in this matter precludes the Department from accepting a criminal referral." Reply to Statement on Behalf of United States Court of International Trade at 5 (Sept. 4, 2001).

and decisions issued in those cases." Pet. 14; see Pet. 11-14. But the government did not disregard the CIT's order in this case; it took an appeal. The government also filed two stay requests in the Federal Circuit, neither of which was acted on during the pendency of the appeal. See p. 3, *supra*. In halting the criminal contempt proceedings initiated by the CIT, the court of appeals did not grant the government or its officers and employees a license to disregard judicial rulings. Rather, the court simply recognized the common-sense proposition that the government is entitled to appeal an adverse ruling even if victory is not certain, and that the officials who participate in the decision to take the appeal may not be charged with criminal contempt simply because the government's arguments on appeal prove unsuccessful.

Petitioner also suggests (Pet. 18, 19) that the court of appeals erred by focusing on the filing of the appeal as the basis for the CIT's initiation of a criminal contempt investigation. Both the caption and the body of the CIT's August 21 order appointing a special prosecutor, however, listed by name the 12 Justice and eight Commerce Department officials who had been identified by the government as participants in the decision to pursue an appeal. App., *infra*, 6a, 8a. The special prosecutor's assigned task was "to investigate and to report on the decision of the defendant and its officers and employees, including but not necessarily limited to the above-named relators, to not obey and/or to willfully resist lawful compliance with the court's interlocutory order of remand." *Id.* at 8a. Although the CIT did not preclude the special prosecutor from extending his inquiry beyond the government's decision to appeal the remand order, the court's August 21 order and the events preceding it reflected a primary focus on the

decision to pursue an appeal, and on the federal officers and employees who had participated in that decision.

In any event, petitioner's suggestion that the court of appeals misconstrued the nature of the criminal proceedings instituted in this case raises no issue of general importance warranting this Court's review. Petitioner does not appear to contest the court of appeals' holding that the decision by government officials to pursue a non-frivolous but ultimately unsuccessful appeal cannot reasonably be regarded as an act of criminal contempt. Petitioner's passing suggestion that the court of appeals failed to recognize and address an alternative ground for the CIT-initiated investigation raises a purely factbound challenge to the Federal Circuit's disposition of this case.

3. Petitioner contends (Pet. 15-21) that the court of appeals lacked jurisdiction to issue a writ of mandamus to the CIT. That argument lacks merit.

It has long been settled that the courts of appeals possess plenary equitable authority under the All Writs Act, 28 U.S.C. 1651, to issue writs of mandamus "when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964). See also *La Buy* v. *Howes Leather*, 352 U.S. 249, 254-260 (1957); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953). There is nothing unique about the Federal Circuit that restricts or implicitly limits that broad equitable authority. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (establishing Court of Appeals for the Federal Circuit as an Article III court). Nor is there anything about the issue in this case—the propriety of criminal contempt proceedings against specific government officials—that insulates it from mandamus review in appropriate circumstances. Cf. *In re: Calmar, Inc.*, 854

F.2d 461 (Fed. Cir. 1988) (granting mandamus where district court clearly abused its discretion in sanctioning counsel).

In asserting that the Federal Circuit lacked jurisdiction to issue a writ of mandamus in this case, petitioner relies heavily on the general principle that appellate jurisdiction does not typically extend to review of interlocutory orders by lower courts. See Pet. 16-17. That principle, however, does not limit the authority of the federal courts of appeals to issue writs of mandamus. Indeed, such writs are employed precisely to correct abuses of authority that would otherwise be unreviewable until after a final judgment.

Thus, in *La Buy*, *supra*, this Court rejected an argument strikingly similar to the one asserted by petitioner here. Responding to a district judge's contention that "the power of the Courts of Appeals does not extend to the issuance of writs of mandamus to review interlocutory orders except in those cases where the review of the case on appeal after final judgment would be frustrated," 352 U.S. at 254, the Court stated that the "question of naked power has long been settled by this Court," *id.* at 255. The Court confirmed that "[s]ince the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them." *Ibid.* While disavowing any intent "to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders," *ibid.*, the Court held that, under the circumstances of the case, the court of appeals' issuance of writs of mandamus was an appropriate exercise of that court's discretion, *id.* at 255-260.

Contrary to petitioner's contention (Pet. 17), the Federal Circuit's prior determination (Pet. App. 5a-8a) that it lacked appellate jurisdiction to review the CIT's remand order in no way implies that the court lacked jurisdiction to issue a writ of mandamus directing the CIT to vacate its orders initiating criminal contempt proceedings. The pertinent language of 28 U.S.C. 1295(a)(5) is substantively indistinguishable from the language of 28 U.S.C. 1291—which limits appellate review to "final decisions of the district courts of the United States"—but the All Writs Act permits interlocutory intervention to correct a "usurpation of judicial power or a clear abuse of discretion." *Schlagenhauf*, 379 U.S. at 110. There was simply no claim in the first appeal that the CIT's remand order involved the sort of clear abuse or usurpation of authority that would support the exercise of the court of appeals' supervisory mandamus jurisdiction even if the Federal Circuit did not have jurisdiction of an appeal from the CIT's remand order.

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." 28 U.S.C. 1651(a) (emphasis added). Apparently relying on the underscored language, petitioner argues (Pet. 18) that Section 1651 "requires a primary basis of jurisdiction in need of [the All Writs Act's] secondary aid." But because the Court of Appeals for the Federal Circuit has jurisdiction to review final decisions by the CIT, see 28 U.S.C. 1295(a)(5); see also Pet. App. 11a (CIT recognizes that the Federal Circuit has "exclusive jurisdiction of an appeal from a final decision of the Court of International Trade"), that requirement is satisfied here.

See *La Buy*, 352 U.S. at 255. The Federal Circuit would have jurisdiction under 28 U.S.C. 1295(a)(5) over any final decision of the CIT, both in the civil case that was remanded to the ITA and in the criminal contempt proceedings themselves.

In the circumstances of the present case, moreover, it is particularly appropriate to regard the court of appeals' issuance of mandamus relief as being "in aid of" that court's jurisdiction. As the Federal Circuit has recognized, a court of appeals does have jurisdiction to review a remand order "when there is a statutory interpretation that will affect the remand proceeding and that legal issue might evade [the court of appeals'] future review." *Dambach* v. *Gober*, 223 F.3d 1376, 1379 (Fed. Cir. 2000); see also Pet. App. 3a ("some remand orders may be considered final for purposes of appellate jurisdiction"); *id.* at 7a ("certain remand orders have been determined to meet the finality requirement"). The court of appeals' ability to exercise effective review over those remand orders that *are* subject to immediate appeal (as well as other interlocutory rulings that are appealable under the "collateral-order" doctrine, see, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468-469 (1978); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949)) would obviously be imperiled if parties who sought immediate appellate review risked criminal contempt proceedings in the event that their reasonable judgments as to the appealability of particular orders turned out to be wrong.

By issuing a writ of mandamus in this case, the court of appeals foreclosed a criminal contempt proceeding that not only could have led to punishment of government counsel for taking a particular appeal that the court of appeals found not to be frivolous, but that also

might well have deterred future litigants from properly invoking that court's appellate jurisdiction. The evident threat to the Federal Circuit's performance of its statutory function that the criminal contempt proceedings here would have posed further supports the conclusion that the court of appeals' issuance of mandamus relief was "in aid of" its jurisdiction within the meaning of 28 U.S.C. 1651(a).

4. Relying on *Will* v. *United States*, 389 U.S. 90 (1967), petitioner contends (Pet. 21-23) that the Federal Circuit's mandamus order should be reversed because the court did not adequately explain the basis for its decision. In *Will*, this Court reversed a writ of mandamus based in part on the "failure of the Court of Appeals to attempt to supply any reasoned justification of its action." 389 U.S. at 104. Here, by contrast, the Federal Circuit supplied a succinct explanation for its conclusion that the government's actions could not support the initiation of criminal contempt proceedings. The court of appeals observed that "[p]recedent regarding the appealability of remand orders * * * is not crystal clear," Pet. App. 3a; it found that the government's decision to take an appeal was "not clearly unjustified" under the circumstances of this case, *ibid.*; and it concluded on that ground that "the determination to seek review of the remand order in this case, and the government's request for a stay of that remand order, cannot serve as a basis for criminal contempt proceedings," *id.* at 4a. No further analysis or explanation was required.

5. Finally, for two distinct reasons, there is a substantial question whether this Court has jurisdiction to consider the certiorari petition filed in this case. For those reasons as well, the petition should be denied.

a. As amended in 1996, Federal Rule of Appellate Procedure 21(a)(1) states that, when a party petitions for a writ of mandamus directed to a court, "[a]ll parties to the proceeding in the trial court other than the petitioner are respondents for all purposes." Rule 21(b)(4) states that "[t]he court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals." The Advisory Committee Notes accompanying the 1996 amendments to Rule 21 explain:

> In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g.*, *Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being "directed to a judge or judges."

The Advisory Committee Notes further explain that "[b]ecause it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to

invite an *amicus curiae* to provide a response to the petition."[6]

The clear purpose and effect of the 1996 amendments to Rule 21 is to change the former practice under which the trial judge whose ruling was the subject of a mandamus petition was treated as a party in the court of appeals. Because neither the CIT nor the individual judge was a party to the proceedings in the Federal Circuit, it would seem to follow that neither is a proper petitioner in this Court. See 28 U.S.C. 1254(1) (authorizing this Court to review cases in the courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case").[7]

b. Section 518(a) of Title 28 of the United States Code provides that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney

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[6] The Federal Circuit did not expressly invite or order the CIT judge, pursuant to Federal Rule of Appellate Procedure 21(b)(4), to file a response to the government's mandamus petition. The court of appeals' August 23, 2001, order stated that "[a]ny respondent who wishes to respond [to the mandamus petition] may do so within 10 days," App., *infra*, 10a; but under Rule 21(a)(1), the "respondents" in a proceeding of this character are "[a]ll parties to the proceeding other than the petitioner." The August 23 order does, however, reflect that it was served both on the "Court of International Trade, Judge," and on the "Court of International Trade, Clerk." App., *infra*, 11a. The CIT submitted within the ten-day period a filing captioned "Statement on Behalf of the United States Court of International Trade." See note 5, *supra*.

[7] The court of appeals' order in the mandamus proceeding was addressed to the CIT, directing it to "vacate its orders initiating criminal contempt proceedings." Pet. App. 4a. That form of the order, however, does not render the CIT a party to the case, any more than an appellate court's issuance of a mandate to a trial court at the conclusion of an appeal as of right renders the trial court a party to the appeal.

General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." The Attorney General has in turn delegated that authority and responsibility for "[c]onducting, or assigning and supervising, all Supreme Court cases, including * * * petitions for * * * certiorari," to the Solicitor General, acting "in consultation with each agency or official concerned." 28 C.F.R. 0.20.

In *United States* v. *Providence Journal*, 485 U.S. 693, 707-708 (1988), this Court held that the United States was "interested," within the meaning of 28 U.S.C. 518(a), in a case in which a federal district court had appointed a private attorney to prosecute a criminal contempt, even though the matter was initiated at the direction of the district court and was "brought to vindicate the authority of the Judiciary and to punish disobedience of a court order." The Court specifically rejected the argument, advanced by the Solicitor General, that Section 518(a) addressed only the interests of the Executive Branch. 485 U.S. at 701. The Court observed that "Congress is familiar enough with the language of separation of powers that we shall not assume it intended, without saying so, to exclude the Judicial Branch when it referred to the 'interest of the United States.'" *Ibid.* The Court also held that the Solicitor General's refusal to authorize a certiorari petition in such a case "does not interfere with the Judiciary's power to protect itself." *Id.* at 702-703. The Court explained that "[w]here the majority of a panel of a court of appeals * * * itself has decided in favor of the alleged contemnor, the necessity that required the appointment of an independent prosecutor has faded and, indeed, is no longer present." *Id.* at 703.

Although the petitioner in this case is the CIT rather than the independent prosecutor, the reasoning of *Providence Journal* would appear to be fully applicable here. The CIT has neither sought nor received the authorization of the Solicitor General to file a certiorari petition. In such circumstances, under *Providence Journal*, the Court lacks jurisdiction in this case. See 485 U.S. at 708; *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 99 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
JACOB M. LEWIS
CHARLES W. SCARBOROUGH
Attorneys

DECEMBER 2001

APPENDIX A

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court No. 99-09-00558

SAVE DOMESTIC OIL, INC., PLAINTIFF

v.

UNITED STATES, DEFENDANT

AND

API AD HOC FREE TRADE COMMITTEE *ET ALIA*,
INTERVENOR-DEFENDANTS

Dated: Aug. 6, 2001

MEMORANDUM & ORDER

AQUILINO, Judge: On November 27, 2000, this court in denying defendant's motion(s) for leave to appeal from its interlocutory order of remand to the International Trade Administration, U.S. Department of Commerce ("ITA"), per slip opinion 00-158, was

> unable to conclude that the defendant [wa]s attempting to proceed in good faith as opposed to in further delay of final determination of plaintiff's prayer for relief if not in contempt.

24 CIT _____, _____, 112 F. Supp. 2d 1375, 1381. Indeed, on August 3, 2001, the defendant served and filed a Second Motion for Extension of Time in which

the Department of Commerce May Respond to the Court's Order of September 19, 2000, appended to which is an order of the U.S. Court of Appeals for the Federal Circuit dated July 31, 2001 and holding that the attempted appeal and concomitant motion for a stay of this court's order by the defendant, as well as by intervenor foreign and multinational oil companies, was baseless.

The interlocutory order in question issued pursuant to slip opinion 00-120, 24 CIT _____, 116 F. Supp. 2d 1324 (2000), familiarity with which is presumed herein. It stated:

> This case is hereby remanded to Commerce for contemplation of commencement of a preliminary investigation by its ITA (and referral for such an investigation by the [International Trade Commission] ITC) in accordance with law . . . . The defendant may have 60 days from the date hereof for this purpose. To the extent, in the exercise of its sound discretion during that time, the agency determines to reconsider its analysis of any of the threshold issues raised by the petition, including the nature of SDO's domestic product *vis-à-vis* that of other domestic producers and support for, and opposition to, the petition on the part of domestic producers and workers, the ITA may call upon the interested parties to supplement the record, and also upon the U.S. Departments of Labor and Energy for relevant, publicly-available data not yet part of the record. If the stated opposition of the API Ad Hoc Free Trade Committee is still sought to be taken into account, the agency is hereby directed to consider the facts and circumstances of the business of each

> Committee company, standing on its own, including most necessarily that particular company's imports of crude petroleum oil from Iraq, Mexico, Saudi Arabia or Venezuela.
>
> If the result of this remand is not initiation of preliminary investigation(s) by the ITA (and the ITC), the written reasons therefor are to be filed with the court on or before the close of the aforesaid 60-day period, whereupon the parties hereto may have 30 days to serve and file comments thereon, with any replies thereto due within 15 days thereafter.

24 CIT at _____, 116 F. Supp. at 1343. In other words, the initial deadline set by slip opinion 00-120 was November 20, 2000.

The defendant did not comply with the foregoing order, nor has it yet done so. Rather, its current motion (for further delay—until August 10, 2001), represents that,

> [a]t this time, an extension . . . is warranted to allow the current Assistant Secretary for Import Administration an opportunity to adequately and faithfully respond to the Court's remand order. During the original 60-day period in which the Court instructed Commerce to conduct its remand, that agency's staff undertook the analysis contemplated in this Court's opinion and order. However, the current Assistant Secretary was only nominated in February 2001 and confirmed in May 2001. Thus, he has not had an opportunity to review this Court's opinion and the staff's analysis in order to make an appropriate determination. A brief extension of time of seven days would allow the Assistant

Secretary sufficient time to render a reasoned and thoughtful decision.

If this representation genuinely reflects a change in the administering authority within the meaning of the Trade Agreements Act of 1979, as amended, in the aftermath of the 2000 presidential election, defendant's motion can be granted. However, neither this motion, nor anything else on the record of this case to date, dispels the above-quoted inability of the court to conclude that the defendant has not been dilatory and contemptuous. Indeed, this court has long warned the ITA and its counsel that they are not at liberty to ignore a remand order, "whether or not subject to further judicial review." *Smith Corona Corp. v. United States*, 13 CIT 96, 100, 706 F. Supp. 908, 912 (1989), *aff'd in pertinent part*, 915 F.2d 683 (Fed. Cir. 1990).

Ergo, while the defendant may have until the close of business on Friday, August 10, 2001, within which to respond to the above-quoted, outstanding order of the court dated September 20, 2001[1], the defendant is also hereby directed to appear before the undersigned in courtroom 3 at 11 a.m. on that day to show cause, if there be any, why it should not be formally cited and sanctioned for contempt of court, commencing on or about November 20, 2000.

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[1] The amount of time for comments on whatever the defendant deigns to submit, and for replies thereto, shall remain as set forth in that order.

The Clerk forthwith shall enter on the docket this memorandum and order and notify all parties to this case thereof before the close of business today.

It is so ordered.

Dated: New York, New York
August 6, 2001

/s/ THOMAS J. AQUILINO, JR.
Judge

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court Misc. No. 01-02

MATTER OF SAVE DOMESTIC OIL, INC., PLAINTIFF

v.

UNITED STATES, DEFENDANT EX REL.

SETH P. WAXMAN, LAWRENCE G. WALLACE, DAVID W. OGDEN, STUART E. SCHIFFER, WILLIAM B. SCHULTZ, DAVID M. COHEN, DOUGLAS N. LETTER, VELTA A. MELNBRENCIS, A. DAVID LAFER, GREGG COSTA, SUSHMA SONI, LUCIUS B. LAU, JAMES DORSKIND, ROBERT S. LARUSSA, TROY CRIBB, RICHARD W. MORELAND, JOHN D. MCINERNEY, BERNIECE A. BROWNE, MARK A. BARNETT AND ROBERT J. HEILFERTY

[Dated: Aug. 21, 2001]

ORDER

The court in CIT case no. 99-09-00558 having filed slip opinion 01-94, 25 CIT _____ (Aug. 6, 2001), which is incorporated herein by reference and which, among other things, directed the defendant to appear before the undersigned on August 10, 2001 to show cause why it should not be formally cited and sanctioned for contempt of the court, commencing on or about November 20, 2000; and Lucius B. Lau and Robert J.

Heilferty having appeared on behalf of the defendant in support of its motion for reconsideration of that order to show cause, which motion was denied; and the court at the hearing on August 10, 2001 having called orally and in writing upon David M. Cohen, A. David Lafer, Lucius B. Lau, Robert J. Heilferty, and all those other officers and employees of the defendant government, who, within the meaning of sections 401 and 402 of Title 18 of the United States Code, have not obeyed and/or who have willfully resisted lawful compliance with the court's order of remand of September 19, 2000, 24 CIT ___, 116 F. Supp. 2d 1324, to the International Trade Administration, U.S. Department of Commerce, to draw near and be heard as to why they, and each of them, should not be punished to the extent permitted by law; and all those officers and employees of the defendant government having been duly apprised of this charge of contempt within the meaning of Federal Rule of Criminal Procedure 42(b) and also that such a charge is very fact specific, whereupon Lucius B. Lau and Robert J. Heilferty were invited by the court to answer certain questions; and Lucius B. Lau and Robert J. Heilferty having been unwilling or unable to answer certain of those questions; and the Acting United States Attorney for the Southern District of New York having thereafter on August 10, 2001 appeared *pro hac vice* on behalf of the defendant and having offered to respond to certain unanswered questions posed by the court; and relators Schiffer and Cohen having served and filed Defendant's Response in Opposition to the Court's Motion for Specified Individuals to . . . be Punished to the Extent Permitted by Law (Aug. 17, 2001) and also Defendant's Response to the Inquiries Made by the Court at the Show Cause Hearing of August 10, 2001, (1) listing "the

officers and employees that participated in the decision to take an appeal" as Seth P. Waxman, Lawrence G. Wallace, David W. Ogden, Stuart E. Schiffer, William B. Schultz, David M. Cohen, Douglas N. Letter, Velta A. Melnbrencis, A. David Lafer, Gregg Costa, Sushma Soni and Lucius B. Lau from the United States Department of Justice and James Dorskind, Robert S. LaRussa, Troy Cribb, Richard W. Moreland, John D. McInerney, Berniece A. Browne, Mark A. Barnett and Robert J. Heilferty from the United States Department of Commerce; (2) expressing inability under the circumstances to waive the appointment of a special prosecutor; and (3) expressing inability to provide the court with a proposed trial date; and the responses provided orally at the hearing on August 10, 2001 and subsequent thereto in writing on behalf of the defendant having failed to dispel the court's duly stated and reported inability to conclude that the government has not been dilatory and contemptuous in CIT case no. 99-09-00558; Now therefore, after due deliberation, it is

ORDERED that Terence P. Stewart, Esq. of Washington, D.C. be, and he hereby is, appointed the United States Court of International Trade's Special Prosecutor to investigate and to report on the decision of the defendant and its officers and employees, including but not necessarily limited to the above-named relators, to not obey and/or to willfully resist lawful compliance with the court's interlocutory order of remand of September 19, 2000, 24 CIT ____, 116 F. Supp. 2d 1324, to the International Trade Administration, U.S. Department of Commerce, and it is further hereby

ORDERED that the special prosecutor file a written report thereon with the court as soon as is practicable,

together with any recommendation as to who, if anyone, should stand trial for criminal contempt of the court in CIT case no. 99-09-00558; and it is further hereby

ORDERED that the Clerk of the Court determine the current business mailing address of each of the above-named relators and send to each of them at his or her particular such address a copy of this order by certified mail, return receipt requested, and it is further hereby

ORDERED that each of the parties to CIT case no. 99-09-00558 be provided by the Clerk of the Court with notice of entry of this order in regular course.

Dated: New York, New York
August 21, 2001

/s/ THOMAS J. AQUILINO, JR.
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Miscellaneous Docket No. 679

IN RE UNITED STATES, PETITIONER

ON PETITION FOR WRIT OF MANDAMUS

[Filed: Aug. 23, 2001]

Before RADER, *Circuit Judge.*

ORDER

The United States petitions for a writ of mandamus to direct the Court of International Trade to halt criminal and contempt proceedings against several attorneys from the Department of Justice appearing before the court.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) Any respondent who wishes to respond may do so within 10 days.

(2) Further proceedings are temporarily stayed.

8/23/01
Date

/s/ RANDALL R. RADER
RANDALL R. RADER
Circuit Judge

cc: David Cohen, Esq.
Robert E. Burke, Esq.
Charles Owen Verrill, Esq.
Joseph W. Dorn, Esq.
Kermit W. Almstedt, Esq.
Bradford L. Ward, Esq.
Court of International Trade, Judge
Court of International Trade, Clerk